Supreme Court, U.S.
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No. ___

IN THE
Supreme Court of the United States

PATRICIA LIMMER, BILLYE JOYCE SMITH,
AND BOBBY JEAN NOTHNAGEL,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY
D/B/A UNION PACIFIC RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federally funded addition of a component of a warning device (retroreflective tape) to an existing warning device (a crossbuck warning sign) at a railroad crossing is the installation of a "warning device" under 23 C.F.R. § 646.214(b)(3) and (4) so as to preempt state-law claims of negligence under this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), where federal regulations define "[p]assive warning devices" as "traffic control devices," 23 C.F.R. § 646.204, and the responsible federal agency has ruled that retroreflective tape is not a "traffic control device."

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Patricia Limmer, Billye Joyce Smith, and Bobby Jean Nothnagle respectfully petition for a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

INTRODUCTION

The Texas Supreme Court adopted a standard for preemption under the Federal Railroad Safety Act of 1970 ("FRSA") and this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), that conflicts with the standard applied by the Eighth Circuit and the highest courts of South Dakota and Louisiana. The decision below also deepens a division of authority among courts in Texas regarding the preemptive effect of a federally funded program to improve railroad crossings in that State. In holding that federal law preempts petitioners' claims, the Texas Supreme Court also disregarded the responsible federal agency's official interpretation of its own regulations, fomenting even further confusion regarding the scope of preemption in this context.

This case involves an issue of great importance for public safety at railway-highway grade crossings. A grade crossing is the intersection of a public road and a railroad track at the same level. Collisions between cars and trains at such crossings kill and injure hundreds of people each year. Traditionally, the States imposed statutory and common-law tort duties on railroads to protect the public safety at grade crossings. In 1970, Congress enacted the FRSA and authorized the Secretary of Transportation to promulgate regulations to promote railroad safety.

The FRSA contains an express preemption provision that preempts state-law claims when a federal regulation "cover[s] the subject matter of" the state-law claims. 49 U.S.C. § 20106(a)(2). In *Easterwood* and *Shanklin*, this Court addressed the preemptive effect of federal regulations on state-law tort claims for negligence. In *Easterwood*, this Court rejected the railroad's contention that federal regulation preempted all claims arising from accidents at grade crossings. Instead, the Court held in *Easterwood*, and reaffirmed in *Shanklin*, that state-law claims are preempted only when federal funds have been used to install a warning device at the crossing in question under 23 C.F.R. § 646.214(b)(3)-(4).

In this case, a warning device (crossbuck sign) was in place at the crossing in question, but it was not proven that the crossbuck had been installed using federal funds. Retroreflective tape had been added to the existing crossbuck with federal funds. The Texas Supreme Court held that the addition of the retroreflective tape to the existing crossbuck sign constituted the installation of a warning device within the meaning of § 646.214(b)(4). That holding conflicts with a decision of the Eighth Circuit, which concluded that the addition of a component part of a warning device does not establish preemption. It also conflicts with decisions from the highest courts of South Dakota and Louisiana holding that federally funded maintenance activities do not constitute the installation of a warning device under federal law. In addition, the decision below disregarded, and gave no deference to, the responsible federal agency's official interpretation of its own regulations. This Court's guidance on the proper interpretation of federal law is needed to restore uniformity to the standard for

preemption of state-law claims arising from accidents at public grade crossings.

OPINIONS BELOW

The opinion of the Texas Supreme Court (Pet. App. 1a-27a) is reported at 299 S.W.3d 78. The opinion of the Texas Court of Appeals (Pet. App. 28a-75a) is reported at 180 S.W.3d 803. The orders of the District Court of Harris County, Texas, granting judgment to petitioners (Pet. App. 76a-78a) and denying respondent's motion for judgment notwithstanding the verdict (*id.* at 79a) are not reported (but are available at 2002 WL 34102422 and 2002 WL 34102421, respectively).

JURISDICTION

The Texas Supreme Court entered judgment on October 23, 2009, and denied a petition for rehearing on January 15, 2010 (Pet. App. 98a). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Federal Railroad Safety Act of 1970 (49 U.S.C. § 20106) and the Highway Safety Act of 1973 (23 U.S.C. § 130), as well as 23 C.F.R. §§ 646.204 and 646.214, are reproduced at Pet. App. 99a-112a.

STATEMENT

A. Federal Law Background

Traditionally, the States have had primary responsibility for protecting public safety at railway-highway crossings. State statutes and common-law tort duties have required railroads to provide, among other things, adequate warnings to the public at crossings. *See, e.g., Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 416-20 (1892). In the 1970s, Congress

enacted two federal statutes intended to improve railroad safety, and the Secretary of Transportation promulgated regulations to implement those statutes. In two cases, this Court has considered the pre-emptive effect of that federal regulatory regime. It has held that the federal regime preempts state-law claims only when the railroad can show that a warning device was installed at the crossing using federal funds.

1. In 1970, in response to a "large and steady increase in the number of train accidents" and the "extremely high fatality rate" of those accidents,[1] Congress enacted the FRSA, Pub. L. No. 91-458, 84 Stat. 971.[2] The FRSA's purpose is "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA contains an express preemption provision. *Id.* § 20106. That provision provides in pertinent part:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement.

Id. § 20106(a)(2).[3]

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[1] H.R. Rep. No. 91-1194, at 72 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4104, 4126.

[2] The FRSA was originally codified as amended at 45 U.S.C. § 421 *et seq.* In 1994, its provisions were recodified in Title 49, without changing their substance. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. This petition cites to the statutory provisions as recodified in Title 49.

[3] In 2007, Congress added subsection (b), titled "Clarification regarding State law causes of action," to § 20106. *See* Implementing Recommendations of the 9/11 Commission Act of 2007,

Three years after passing the FRSA, Congress enacted the Highway Safety Act of 1973, which created the federal Railroad-Highway Crossings Program ("Crossings Program"). *See* Pub. L. No. 93-87, tit. II, § 203, 87 Stat. 250, 282, codified as amended at 23 U.S.C. § 130. The Crossings Program provided federal funding for States for "construction of projects for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a).

2. The Secretary of Transportation, through the Federal Highway Administration ("FHWA"), has promulgated regulations to implement the Crossings Program. One such regulation, 23 C.F.R. § 646.214(b), addresses the design of grade-crossing improvements, including the adequacy of warning devices installed under the Program. Subsection (b)(3) addresses the adequacy of warning devices "on any project where Federal-aid funds participate in the installation of the devices," and it mandates the inclusion of automatic gates with flashing light signals if any of several conditions are present at the crossing. *Id.* § 646.214(b)(3). Subsection (b)(4) provides that, "[f]or crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA." *Id.* § 646.214(b)(4).

"Warning device" is not defined as such in the regulations. Instead, the regulations define "[a]ctive warning devices" as "those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar

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Pub. L. No. 110-53, § 1528, 121 Stat. 266, 453. That subsection does not affect the question presented in this case.

devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train." *Id.* § 646.204. "Passive warning devices" are defined as "those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." *Id.* The FHWA's *Manual on Uniform Traffic Control Devices for Streets and Highways* ("Manual"), which has been incorporated into the FHWA's regulations,[4] defines "[t]raffic control devices" as "all signs, signals, markings, and other devices used to regulate, warn, or guide traffic." Manual at I-1 (Pet. App. 118a).[5]

3. This Court has twice addressed the preemptive effect of the federal regime described above on state-law claims of negligence for inadequate warning devices at railway-highway crossings. In *Easterwood*, the Court considered whether the FHWA's regulations "cover[] the subject matter" of the allegations of negligence within the meaning of the FRSA's express preemption provision. 49 U.S.C. § 20106(a)(2). The Court rejected a broad view of preemption advanced by the railroad. It explained that the regulations as a whole did not preempt state-law claims entirely, but merely "establish[ed] the general terms of the bargain between the Federal and State Governments." 507 U.S. at 667. Likewise, the Court

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[4] *See* 23 C.F.R. § 655.601(a).

[5] The Texas Supreme Court relied on the 2003 version of the Manual (which incorporated two subsequent revisions), and this petition cites to that version, which is available at http://mutcd.fhwa.dot.gov/pdfs/2003r1r2/mutcd2003r1r2complet.pdf.

found no preemption based on the requirement in § 646.214(b)(1) that States employ devices "that conform to standards set out in" the Manual. *Id.* at 666. The Court explained that the Manual only "provides a description of, rather than a prescription for, the allocation of responsibility for grade crossing safety between the Federal and State Governments and between States and railroads." *Id.* at 669. The Court concluded, however, that § 646.214(b)(3) and (4) "do establish requirements as to the installation of particular warning devices"; thus, when those regulations apply, "state tort law is pre-empted." *Id.* at 670. In adopting that narrow view of the preemptive effect of the federal scheme, the Court approved the position advocated by the United States.[6]

Applying that narrow approach to the facts of the case, the Court concluded that the railroad had not "establish[ed] that federal funds 'participate[d] in the installation of the [warning] devices'" at the crossing where the accident occurred. *Id.* at 672 (quoting § 646.214(b)(3)(i)) (second and third alterations in original). Only motion-detection circuitry had been added at the crossing. *See id.* at 671-72.[7] The Court determined that the motion-detection circuitry did "not meet the definition of warning devices provided

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[6] *See* Brief for the United States as Amicus Curiae Supporting Affirmance at 11-12, *Easterwood*, *supra* (Nos. 91-790 & 91-1206) ("U.S. *Easterwood* Br.") (arguing that the Manual and the general implementing regulations of the Crossings Program "do not generally preempt States from imposing duties of care on railroads to provide adequate safety devices at grade crossings," but that § 646.214(b)(3)-(4) support a finding of preemption when they apply).

[7] The actual crossing gate (for which funds had been set aside) was never installed; the plan for the gate was abandoned and the funds reallocated. *See Easterwood*, 507 U.S. at 671-72.

in 23 CFR 646.204(i) and (j)." *Id.* at 672.[8] Accordingly, the Court held that § 646.214(b)(3) and (4) were "inapplicab[le]" and that the state-law claims were not preempted. *Id.* at 673.

This Court reaffirmed *Easterwood* in *Shanklin*. It held that state law is preempted only "once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating." 529 U.S. at 354. The Court noted that its interpretation of the preemptive effect of § 646.214(b)(3) and (4) was "precisely" the interpretation that the FHWA endorsed in *Easterwood*. *Id.* (citing U.S. *Easterwood* Br. at 23).

Thus, under this Court's decisions, for a railroad to establish that federal law preempts a challenge to the adequacy of a warning device, it must demonstrate that federal funds participated in the "install[ation]" of a "warning device" at the crossing in question. 23 C.F.R. § 646.214(b)(4).

B. State Law Background: The 1989 Program

In 1989, Texas enacted a statute directing a state agency to "develop guidelines and specifications for the installation and maintenance of retroreflectorized material at all public grade crossings not protected by active warning devices."[9] Retroreflectivity

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[8] Section 646.204 was later amended by, among other things, removing the paragraph designations and placing the definitions in alphabetical order. *See* 62 Fed. Reg. 45,326 (Aug. 27, 1997) (interim rule); 68 Fed. Reg. 24,639 (May 8, 2003) (final rule adopting interim rule). The substance of the definitions of active and passive warning devices did not change.

[9] Act of May 17, 1989, 71st Leg., R.S., ch. 269, § 2, 1989 Tex. Gen. Laws 1212, 1213, previously codified as Tex. Rev. Civ. Stat. Ann. art. 6370b, § 2, recodified by Act of May 23, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1460,

is "a property of a surface that allows a large portion of the light coming from a point source to be returned directly back to a point near its origin."[10] The Texas law provided that "retroreflectorized material shall be affixed to the backs of crossbucks and their support posts in a manner that retroreflects light from vehicle headlights to focus attention to the presence of a nonsignalized crossing."[11] Crossbucks are "the familiar black-and-white, X-shaped signs that read 'RAILROAD CROSSING.'" *Shanklin*, 529 U.S. at 350. Federal funds were used to implement the 1989 program. *See* Pet. App. 14a. As provided in the Texas statute, the tape was applied to all crossings without an active warning device. There was no individualized review or approval of the adequacy of the warning devices at the crossings.

C. Procedural History

Respondent's railroad runs through the small town of Thorndale, Texas, crossing several streets, including Front Street. *See* Pet. App. 3a. There are two tracks at the Front Street crossing – a main line track on which trains can travel up to 60 mph, and a siding track. In April 1994, there was a large pile of gravel as big as a house – 14 feet high and 100 feet long – restricting a driver's view to the west of the crossing, along with vegetation growing in the railroad right-of-way. *See id.* at 4a. The crossing was

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codified as amended at Tex. Transp. Code Ann. § 471.004(a) (substituting the phrase "reflecting material" for "retroreflectorized material").

[10] Manual § 1A.13.

[11] Tex. Rev. Civ. Stat. Ann. art. 6370b, § 2, codified as amended at Tex. Transp. Code Ann. § 471.004(a) (substituting the phrase "unsignaled crossing" for "nonsignalized crossing" and "reflecting material" for "retroreflectorized material").

equipped with crossbuck warning devices, one crossbuck sign on each side of the crossing. *See id.* Pieces of retroreflective tape had been attached to the backs of the blades of the crossbuck signs and to the poles supporting the crossbuck signs.[12]

On April 24, 1994, three weeks after his retirement, William Limmer drove his pickup truck over the Front Street crossing. *See id.* at 29a. A train traveling at 40-50 mph from the side of the crossing where the obstructing pile of gravel rested collided with Mr. Limmer's vehicle, killing him instantly. *See id.* at 4a.

1. Trial Court Proceedings

Patricia Limmer and her two daughters sued respondent for negligence. Respondent asserted the affirmative defense of preemption, arguing that petitioners' claims were preempted because federal funds had paid for warning devices installed at the Front Street crossing. The preemption defense was tried to the bench, and the trial court rejected the defense. *See* Pet. App. 10a.

The negligence case was submitted to the jury. The charge and verdict form reflects that the jury found that the crossing was extra-hazardous, *i.e.*, that, "because of surrounding conditions, it [wa]s so dangerous that [a] person using ordinary care cannot pass over it in safety without some warning other than the usual cross buck sign." *Id.* at 84a. The jury further found that respondent was negligent and that its negligence was a proximate cause of the accident, after being instructed that it could consider only the following allegations of negligence: that respondent failed to provide automatic signals (such

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[12] For a diagram of the crossing, see Pet. App. 3a.

as flashing lights or gates), failed to provide a flag man, and failed to install a stop sign. *See id.* The jury separately determined that respondent was negligent and that its negligence was a proximate cause of the accident, after being instructed to consider only the following allegations of negligence: the failure to eliminate the sight restrictions, if any, caused by the gravel pile and the vegetation. *See id.* at 85a.

The jury also concluded that Mr. Limmer was negligent and that his negligence was also a proximate cause of the accident. It assigned proportionate responsibility for the collision at 85% to Union Pacific and 15% to Mr. Limmer. *See id.* at 87a. The trial court applied those percentages to the jury's award of compensatory damages. No punitive damages were awarded. *See id.* at 77a.

2. Texas Court of Appeals

Respondent appealed the judgment on several grounds, including that the trial court had erred in rejecting its preemption defense. The court of appeals affirmed the trial court's decision on the preemption issue. *See* Pet. App. 29a. Respondent argued that federal funds were expended to install warning devices at the Front Street crossing as part of two different programs: (1) a 1977 program designed to ensure that all public grade crossings in Texas complied with the minimum standards of the Manual, and (2) the 1989 program described above to add retroreflective tape to crossbuck signs in Texas. The court of appeals found that respondent had not shown that federal funds had been used to install

warning devices at the Front Street crossing under the 1977 program. *See id.* at 40a-51a.[13]

As for the 1989 program, the court of appeals held that petitioners' claims were not preempted because the retroreflective tape was not a warning device under 23 C.F.R. § 646.214(b). Looking to this Court's decisions in *Shanklin* and *Easterwood*, the court noted that "the proper inquiry is to see if the installed item meets the definition of warning device by being either an active warning device or a passive warning device as defined" in § 646.204. *Id.* at 52a. No party contended that the tape met the definition of an active warning device. *See id.* at 53a. "To qualify as a passive warning device," the court explained, "the Tape must be a 'traffic control device[] . . . located at or in advance of [the Front Street Crossing] to indicate the presence of a crossing.'" *Id.* (quoting 23 C.F.R. § 646.204) (alterations in original).

The court of appeals concluded that the tape was not a traffic control device. It recognized that the FHWA had issued an interpretation stating that retroreflective tape is not considered a traffic control device. *See id.* at 55a. The FHWA issued that interpretation in response to a request from petitioners' expert witness for an official ruling as to whether retroreflective tape on the back of a crossbuck sign and traffic sign posts constitutes a traffic control device. *See id.* at 116a-117a. The official interpretation – issued on August 2, 2000, and signed by Shelley J. Row, Director of the FHWA's Office of Transportation Operations – provides that "[r]etro-

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[13] The court of appeals initially found that preemption had been established based on that 1977 program, but that opinion was vacated on rehearing and replaced with the opinion described herein.

reflective tape is not considered a traffic control device and, therefore, its use around a traffic sign post does not conflict with the standards in the Manual on Uniform Traffic Control Devices." *Id.* at 116a. The court of appeals further observed that the Manual nowhere identifies retroreflective tape as a traffic control device. *See id.* at 54a. In addition, the court explained that, to be a warning device, the item must "indicate the presence of a crossing," 23 C.F.R. § 646.204, a function that tape alone does not and cannot perform, *see* Pet. App. 58a-59a.

The court of appeals also recognized that its conclusion that the tape is not a warning device was consistent with two federal district court decisions in Texas, both of which had rejected respondent's preemption defense based on the same 1989 program. *See id.* at 57a-58a.

3. Texas Supreme Court

The Texas Supreme Court granted discretionary review, reversed the court of appeals' judgment on the preemption issue, and ordered that judgment be rendered in favor of respondent. The court did not address the court of appeals' holding that preemption had not been established under the 1977 program. *See* Pet. App. 20a. It instead reversed the court of appeals and found preemption based on the 1989 program, holding that the addition of retroreflective tape to an existing crossbuck sign was the installation of a warning device as a matter of law.

The court began its analysis by quoting a number of definitions, including the definition of "[p]assive warning devices" in 23 C.F.R. § 646.204, the definition of "[t]raffic control devices" in the Manual, and the definition of "[t]raffic [m]arkings" in the FHWA's *Railroad-Highway Grade Crossing Handbook*. *See*

Pet. App. 14a-15a.[14] The court then opined – with little analysis – that, because "[m]arkings are specifically mentioned in the federal regulations as traffic control devices" and retroreflective tape attached to a crossbuck is "certainly" a marking, the tape must be both a traffic control device and a warning device under § 646.214(b)(4). *Id.* at 15a-16a. As for the fact that retroreflective tape is not identified as a traffic control device in the Manual, the court stated that "the *Manual* contemplates that most signs and warning devices will be retroreflective; it also mentions strips for crossbucks in several sections." *Id.* at 16a.

In addition, the court concluded that, even if the application of the tape was "only an enhancement or maintenance of the existing signs, not an installation," such application could still trigger preemption, because it amounts to "approval" of the type of warning device to be installed under the grade-crossing regulations. *Id.* at 19a-20a. Accordingly, the court declared "as a matter of law that the application of retroreflective tape to the crossbucks at the Front Street crossing was an installation of a federally funded and approved warning device" that preempted petitioners' claims. *Id.* at 20a.

As for the official FHWA interpretation stating that retroreflective tape is not considered a traffic control device, the court stated that it was "unable to

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[14] The Texas Supreme Court cited both the September 1986 version and the August 2007 version of the Handbook. *See* Pet. App. 15a n.50 (citing FHWA, U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* (2d ed. Sept. 1986), *available at* http://www.fhwa.dot.gov/tfhrc/safety/pubs/86215/86215.pdf ("1986 FHWA Handbook"); and FHWA, U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* (rev. 2d ed. Aug. 2007), *available at* http://www.fra.dot.gov/downloads/safety/HRGXHandbook.pdf ("2007 FHWA Handbook")).

ascribe any persuasive value to Rowe's [*sic*] letter." *Id.* at 19a. The court also explicitly refused to follow the two Texas federal court decisions that had rejected preemption defenses based on the same 1989 program. *See id.* at 19a n.60.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE EIGHTH CIRCUIT, THE HIGHEST COURTS OF SOUTH DAKOTA AND LOUISIANA, AS WELL AS DECISIONS FROM OTHER STATE AND FEDERAL COURTS

The Texas Supreme Court's holding that the application of retroreflective tape was the "install[ation]" of a "warning device" such that 23 C.F.R. § 646.214(b)(4) applies and preempts petitioners' negligence claims conflicts with decisions of the Eighth Circuit, the highest courts of South Dakota and Louisiana, and other federal and state courts. Those courts properly have concluded that the addition of a component of a warning device or other federally funded item to a crossing is not the installation of a warning device under § 646.214(b)(4). Those holdings comport with this Court's decision in *Easterwood*. The decision below creates a division of authority on the proper standard for preemption in this context and creates the injustice that citizens in some States enjoy redress for certain forms of railroad negligence but citizens in Texas do not. This Court's review is needed to resolve the division of authority and to establish a uniform standard for determining when the federal railroad-safety regime preempts state law claims.

A. The Texas Supreme Court's Decision Conflicts With Decisions Of The Eighth Circuit And The Highest State Courts Of South Dakota And Louisiana, And Is Inconsistent With *Easterwood*

1. In *St. Louis Southwestern Railway Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994), the Eighth Circuit decided a closely analogous case exactly the opposite of how the Texas Supreme Court decided this one. There, the Arkansas Highway and Transportation Department had inspected the crossing in question and decided to replace the lenses on the existing flashing light signals with larger lenses and to add automatic crossing gates. *Id.* at 866. The lenses were replaced within a week, but the plaintiff's accident at the crossing occurred before installation of the automatic crossing gates was completed. *Id.* The Eighth Circuit held that the addition of the federally funded larger lenses did not preempt the plaintiff's claims. It reasoned that, "like the circuitry installed in *Easterwood*, we do not believe the exchange of a single component part of the lights in place before the upgrade was the installation of a warning device defined in 23 C.F.R. § 646.204(i)-(j)." *Id.* at 867. Thus, under *Malone Freight*, the test for whether a warning device has been installed at a crossing is whether the item that is added is itself a "warning device" under the grade-crossing regulations.

The Eighth Circuit's decision in *Malone Freight* correctly followed this Court's reasoning in *Easterwood*. In *Easterwood*, funds had been allocated to install a warning gate at the crossing where the accident occurred. At the time of the accident, however, only motion-detection circuitry actually had been

placed in the warning gate. The railroad argued that, because "[t]he [Manual] recognizes that motion detection circuitry is a basic component of an active warning device system,"[15] the addition of the circuitry alone sufficed to establish preemption of the state-law claims. This Court rejected that contention. Focusing on the particular component at issue – the motion-detection circuitry – the Court explained that "[s]uch circuitry does not meet the definition of warning devices provided in 23 CFR §§ 646.204(i) and (j)." 507 U.S. at 672. Because the circuitry was not a warning device, § 646.214(b)(4) was "inapplicab[le]" and therefore not a basis for preemption. *Id.* at 673.

The Texas Supreme Court's decision conflicts with *Malone Freight*'s faithful application of *Easterwood*. While a crossbuck is a warning device under the grade-crossing regulations, retroreflective tape is only a component of a properly maintained crossbuck.[16] Like the lenses in *Malone Freight* and the circuitry in *Easterwood*, the tape itself provides no warning; it only functions to warn drivers as a component of the crossbuck apparatus. The Texas Supreme Court opined that the tape's purpose was to reflect light and provide warning to drivers, *see* Pet. App. 16a, but the same could be said for the larger lenses in *Malone Freight*. This case thus would have been decided differently in the Eighth Circuit.

2. The Texas Supreme Court's decision also conflicts with decisions of other state appellate courts. In particular, the highest courts of two States have

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[15] Reply Brief for Petitioner and Cross-Respondent at 21, *Easterwood*, *supra* (Nos. 91-790 & 91-1206).

[16] *Cf. Shanklin*, 529 U.S. at 350 (preemption triggered where crossing in question was equipped with federally funded advance warning signs and "reflectorized crossbucks").

concluded that federally funded maintenance or improvement activities do not support preemption if the item added is not itself a "warning device." In *Boomsma v. Dakota, Minnesota & Eastern Railroad Corp.*, 651 N.W.2d 238 (S.D. 2002), *overruled on other grounds by State v. Martin*, 683 N.W.2d 399 (S.D. 2004), federal funds had been used to add rubberized mats to the crossing in question. The South Dakota Supreme Court rejected the railroad's preemption defense, explaining that "[i]t is of no consequence that federal funds were used to put rubberized mats on the service line" because the "rubber mats do not constitute warning devices." *Id.* at 244. Likewise, in *Duncan v. Kansas City Southern Railway Co.*, 773 So. 2d 670 (La. 2000), the railroad could prove only that federal funds were used to add an inventory number to the crossing where the accident occurred. The Louisiana Supreme Court found no preemption, stating that "[a]n inventory number does not meet the definition of warning devices provided in" § 646.204. *Id.* at 680. A New Mexico appellate court reached a similar conclusion in *Largo v. Atchison, Topeka & Santa Fe Railway Co.*, 41 P.3d 347 (N.M. Ct. App. 2001). There, the federally funded maintenance activity involved "widen[ing] and install[ing] sixteen track feet of timber planking at the crossing." *Id.* at 350-51. The court concluded that the claims were not preempted, stating that "the record indicates that no warnings were placed at the crossing as the result of the federal program." *Id.* at 351.

Those decisions correctly recognize that it is not enough for federal funds to have been used in connection with any maintenance or improvement activity at the crossing. Instead, under those decisions,

preemption is appropriate only when a "warning device" is installed within the meaning of the FHWA's regulations. Under the decision below, by contrast, essentially any minor upgrade to a warning device at a crossing can be considered the installation of a new warning device, triggering preemption under *Easterwood* and *Shanklin*. This Court's guidance is needed to establish the proper standard for determining when a warning device has been installed at a crossing under § 646.214(b)(4).

B. The Decision Below Squarely Conflicts With Federal Court Decisions On The Preemptive Effect Of Texas's 1989 Program

In addition to the broader conflict over the proper interpretation of § 646.214(b)(4) outlined in Part I.A, *supra*, federal district court decisions specifically addressing the application of retroreflective tape demonstrate the confusion in the lower courts regarding the standard for determining when an addition at a crossing constitutes the installation of a warning device under § 646.214(b)(4). As the Texas Supreme Court acknowledged, *see* Pet. App. 19a n.60, three federal district courts in Texas have considered the preemptive effect of the 1989 program to apply retroreflective tape to crossbucks in Texas. Two of those courts denied summary judgment for the defendants, while the other court gave preemptive effect to the application of retroreflective tape under the 1989 program.

In *Lesly v. Union Pacific Railroad Co.*, No. H-03-0772, 2004 U.S. Dist. LEXIS 23018 (S.D. Tex. June 25, 2004), the court considered whether the 1989 program to add "retroreflective material on crossbucks at all crossings that did not have active warning devices" preempted state-law claims arising from

accidents at those crossings. *Id.* at *11. The court concluded that retroreflective tape, "in and of itself, is not a 'warning device' as defined by" the Manual. *Id.* at *12. Accordingly, the court held that "Union Pacific cannot rely on the doctrine of preemption." *Id.*

Similarly, the court in *Enriquez v. Union Pacific Railroad Co.*, No. 5:03-CV-174, 2004 U.S. Dist. LEXIS 28989 (E.D. Tex. Dec. 30, 2004), denied a motion for summary judgment based on the addition of retroreflective tape to a crossbuck under the 1989 program. The court rejected the notion "that reflective tape, alone, amounts to a passive warning device." *Id.* at *45. Relying on *Lesly*, the court explained that, "[i]n the same sense that the pole of a crossbuck sign is not a passive warning device, the tape, without more, is not a passive warning device." *Id.* The court further noted that this was true under both the regulation's definition of passive warning device and the Manual's definition of traffic control device. *See id.* at *44-*45.

Another federal district court in Texas, however, reached the opposite conclusion on the preemptive effect of the 1989 program. *See McDaniel v. Southern Pac. Transp.*, 932 F. Supp. 163 (N.D. Tex. 1995). That court found that "federal funds were approved and expended, from 1989 to the early 1990s, in the course of an upgrading project which provided for applying reflectorized tape to the backs of crossbucks" and that photographs of the crossing where the accident occurred "clearly show[ed] reflectorized tape attached to the support posts of the crossbucks." *Id.* at 167. On the basis of those facts, the court concluded that preemption was appropriate. *See id.* In doing so, the court implicitly determined – without

analysis or explanation – that the mere "upgrading of the crossbucks with reflectorized tape" (*id.*) constituted the "install[ation]" of a "warning device" within the meaning of § 646.214(b)(4).[17]

That conflict between the federal district courts and state supreme court in Texas creates significant confusion and the opportunity for forum-shopping and races to the courthouse. In the Eastern and Southern Districts of Texas, a person seeking to recover for injury or death caused by negligence at a crossing marked with retroreflective tape can cite authority for the proposition that its claim is not preempted, whereas a plaintiff in Texas state court will be denied a cause of action for the railroad's negligence through preemption and a plaintiff in the Northern District faces contrary authority on the question. In *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), this Court granted certiorari to resolve a disagreement between the Texas Supreme Court and the Texas federal courts on the preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act. It should do the same here.

II. THE TEXAS SUPREME COURT'S PREEMPTION STANDARD CONTRADICTS THE REGULATIONS' PLAIN LANGUAGE AND THE IMPLEMENTING AGENCY'S INTERPRETATION OF THOSE REGULATIONS

The Texas Supreme Court held that the application of retroreflective tape to a crossbuck is the "install[ation]" of a "warning device" as a matter of law, such that § 646.214(b)(3) and (4) apply and preempt state-law claims. In so holding, the Court

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[17] The *McDaniel* court also held in the alternative that preemption would be appropriate based on the 1977 Texas program. *See* 923 F. Supp. at 167.

misinterpreted the pertinent federal regulations, disregarded the promulgating agency's official interpretation of those regulations, and violated the presumption against preemption.

A. No "Warning Device" Was "Installed" When Retroreflective Tape Was Applied To The Crossbucks At The Front Street Crossing

Under *Easterwood*, preemption applies only "for projects in which federal funds participate in the installation of warning devices," 507 U.S. at 671, because it is only then that the grade-crossing regulation, which refers to the "install[ation]" of a "warning device" at a crossing, 23 C.F.R. § 646.214(b)(4), "cover[s] the subject matter of" state tort law within the meaning of the FRSA's express preemption provision, 49 U.S.C. § 20106(a)(2). Under the regulation's plain language, no "warning device" was "installed" when retroreflective tape was applied to the existing crossbucks at the Front Street crossing.

Retroreflective tape is not a "warning device" under § 646.214(b)(4). The regulations define "[p]assive warning devices" as "those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing." 23 C.F.R. § 646.204. Thus, to be a "passive warning device," an item must be a "traffic control device" that "indicate[s] the presence of a crossing." *Id.* Retroreflective tape satisfies neither of those conditions. First, retroreflective tape does not "*indicate* the presence of a crossing." *Id.* (emphasis added). Without a crossbuck, the tape does not indicate the presence of anything, let alone a crossing.

Second, retroreflective tape is not a "traffic control device." Traffic control devices are defined in the Manual as "signs, signals, markings, and other devices *used to regulate, warn, or guide traffic*." Manual at I-1 (Pet. App. 118a) (emphasis added). Just as retroreflective tape alone does not "indicate the presence of a crossing," 23 C.F.R. § 646.204, the tape itself does not "regulate, warn, or guide traffic," Manual at I-1 (Pet. App. 118a). Nor is retroreflective tape a "sign[], signal[], [or] marking[]." *Id.* Nothing in the Manual suggests that those terms refer to retroreflective tape.

In any event, nothing was "installed" at the crossing within the meaning of § 646.214(b)(4). In ordinary usage, one does not speak of "installing" tape. The retroreflective tape was applied, attached, or affixed to the crossbucks at the Front Street crossing. But it was not "installed." *See Lesly*, 2004 U.S. Dist. LEXIS 23018, at *12 (refusing to accept railroad's contention that "the process of merely adding retroreflective tape to crossbucks constitutes 'installing' a 'warning device'").[18]

B. The Texas Supreme Court Misinterpreted The Governing Federal Regulations

To support its holding that the tape is a warning device under the regulations, the Texas Supreme Court asserted that the tape is a "*marking* used to

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[18] The Texas Supreme Court asserted that it saw "no reason why" the application of retroreflective tape, if considered just an enhancement or maintenance activity, would not fall under the grade-crossing regulations as demonstrating FHWA "approval" of the warning devices at the crossing. Pet. App. 19a. That is incorrect because preemption under *Easterwood* and *Shanklin* requires the "install[ation]" of a warning device. 23 C.F.R. § 646.214(b)(4).

warn traffic of railroad crossings." Pet. App. 15a (emphasis added). The court pointed to the definition of a "passive warning device" as "including signs, markings and other devices." 23 C.F.R. § 646.204; *see* Pet. App. 14a. But, under the regulation, a "marking[]" is only a passive warning device if it "indicate[s] the presence of a crossing." 23 C.F.R. § 646.204. Retroreflective tape alone does not indicate the presence of a crossing, *see supra* Part II.A, and the court below offered no explanation of how it could fulfill that function.

In addition, the court below noted that the Manual "mentions strips for crossbucks in several sections." Pet. App. 16a. But the court failed to consider the nature and context of those references. There is no mention of the tape being a warning device itself. Instead, the Manual refers to retroreflective tape as a component or feature of the warning device. Thus, it states that crossbucks should be "retroreflectorized white," that a "strip of retroreflective white material . . . shall be used on the back of each blade of each Crossbuck sign," and that a "strip of retroreflective white material . . . shall be used on each support at passive highway-rail grade crossings." Manual § 8B.03. Those passages demonstrate that retroreflective tape is a *component* of a warning device – namely, a properly reflectorized crossbuck – not a warning device itself. That reflectorization is simply a feature of certain warning devices is confirmed by § 1A.03 of the Manual, which provides that "[d]evices should be designed so that *features such as* size, shape, color, composition, lighting or *retroreflection*, and contrast are combined to draw attention to the devices." Manual § 1A.03 (emphases added).

Furthermore, neither the Manual's separate part on "markings" nor the chapter on "Signs and Marking" within the Grade Crossings part provides any support for the Texas Supreme Court's conclusion that retroreflective tape applied to a crossbuck is a "marking" as that term is used in the definition of a traffic control device. To begin with, retroreflective tape is not listed in those sections of the Manual that discuss markings. And the chapter addressing markings in the context of grade-crossing traffic control devices discusses "pavement markings," "stop lines," and "dynamic envelope markings," Manual §§ 8B.20-8B.22,[19] none of which is remotely similar to the application of retroreflective tape to a crossbuck.

Finally, the court below relied on the FHWA's Handbook, which the court noted defines "[t]raffic markings" as "[a]ll lines, patterns, words, colors, or other devices, except signs, set into the surface of, applied upon, or attached to the pavement or curbing or to the objects within or adjacent to the roadway, officially placed for the purpose of regulating, warning, or guiding traffic." Pet. App. 15a (quoting 2007 FHWA Handbook at 226). Again, however, retroreflective tape alone does not "regulat[e], warn[], or guid[e] traffic" and thus does not meet that definition. Furthermore, a full review of the Handbook demonstrates that retroreflective tape is not considered a traffic control device. The 2007 FHWA Handbook has (at 83-97) an entire section devoted to "Passive Traffic Control Devices." That section is further divided into two sections – "Signs" and "Pavement Markings." Those sections refer to the Manual, and,

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[19] "Dynamic [e]nvelope" refers to "the clearance required for the train and its cargo overhang due to any combination of loading, lateral motion, or suspension failure." Manual § 1A.13.

although they discuss the crossbuck as an example of a sign that is a passive warning device, there is no mention of retroreflective tape as its own warning device. Rather, as in the Manual, the Handbook discusses the use of the tape in the section discussing features of a crossbuck warning device. That section also has (at 85-86) a table titled "Current MUTCD Devices," which lists numerous devices under the heading "Traffic control device" – including the crossbuck – but *not* retroreflective tape.

In any event, the Handbook neither states "official policy" nor "'constitute[s] a standard, specification, or regulation,'" as the court below admitted. Pet. App. 15a n.50 (quoting 2007 FHWA Handbook (Notice)). Thus, nothing in the Handbook could override the grade-crossing regulations and the Manual, both of which make clear that retroreflective tape is not a warning device.

C. The Court Below Disregarded The FHWA's Conclusion That Retroreflective Tape Is *Not* A Traffic Control Device

The Texas Supreme Court's construction of the Manual conflicts with the interpretation of the federal agency that promulgated it.

1. The FHWA's Manual recognizes that "situations often arise" that necessitate "interpretation or clarification of this Manual." Manual § 1A.10. Accordingly, the FHWA has established a procedure for submitting requests for "official interpretations of the [Manual]" to the FHWA's Office of Transportation Operations.[20] "FHWA responds to each request

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[20] FHWA, Official MUTCD Interpretations Issued by FHWA ("*Official Manual Interpretations*"), *at* http://mutcd.fhwa.dot.gov/resources/interpretations/index.htm; *see* Manual § 1A.10.

for an interpretation with a formal written reply." *Official Manual Interpretations*. Recent official interpretations are posted on the Internet for public access. *Id.* The FHWA further explains that "an Official Interpretation should be considered as FHWA policy guidance" and that "agencies are encouraged to follow guidance given in an interpretation." *Id.*

Petitioners followed the FHWA's procedures for obtaining an official interpretation. Before trial, petitioners' expert witness wrote a letter to the FHWA requesting an official determination of whether retroreflective tape is a traffic control device under the Manual. In response, the FHWA issued an "official ruling" concluding that "[r]etroreflective tape is not considered a traffic control device." Pet. App. 116a.[21] The official ruling was signed by Shelley Row, as Director of the FHWA's Office of Transportation Operations. The FHWA's interpretation of its Manual, which has been incorporated into the agency's regulations, is entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (unless contrary to the plain text, agency's interpretation of its own regulation is dispositive).[22]

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[21] Interpretation II-56(I) also advised that the use of retroreflective tape on the back of crossbucks had been proposed in § 8B.2 of the revision of the Manual. As discussed above, the 2003 version of the Manual provides in § 8B.03 that a crossbuck should have retroreflective tape on the back of its blades except in certain circumstances.

[22] The Texas Supreme Court incorrectly asserted (*see* Pet. App. 17a) that petitioners had not argued that this letter was entitled to deference. *See* Brief on the Merits of the Limmer Parties as Respondents at x, 22 (Tex. filed Jan. 31, 2007).

The FHWA's determination that retroreflective tape is not a "traffic control device" is significant because the regulations define a "[p]assive warning device[]" as a "traffic control device[]." 23 C.F.R. § 646.204. The FHWA's determination that retroreflective tape is not a traffic control device therefore means that the tape also is not a warning device under the grade-crossing regulations. Accordingly, § 646.214(b)(4) does not apply, and there is no preemption under *Easterwood* and *Shanklin*.

2. The Texas Supreme Court dismissed the FHWA's official ruling as simply a brief, "conclusory" piece of personal correspondence from Director Row. Pet. App. 18a. But that ignores the FHWA's official process for obtaining an authoritative interpretation of the Manual, a process that petitioners followed in this case. The Texas Supreme Court's references to "Rowe's [*sic*] consideration" as insufficiently "thorough" and to the interpretation as "conclusory" and "contain[ing] no reasoning and no reference to authority of any kind," *id.*, miss the point. A court's obligation to defer to an agency's interpretation of its own regulation under *Auer* does not depend on the thoroughness of the agency's consideration or reasoning. *See Auer*, 519 U.S. at 461; *cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (weight given to agency's informal *statutory* interpretation depends on thoroughness of consideration, validity of reasoning, and consistency). The Texas Supreme Court thus failed to give the agency's official interpretation the deference it deserved.

The court below also discounted the FHWA's official ruling because it found that ruling to be in "some tension" with a 1989 letter from an FHWA safety and traffic operations coordinator to a Texas employee.

Pet. App. 18a. The court stated that the 1989 letter "encourag[ed] participation in the retroreflective tape program, repeatedly referring to the tape as a 'device' and describing its use as a warning signal." *Id.* at 18a-19a. Nothing in the 1989 letter, however, stated that retroreflective tape is a "warning device" within the meaning of the grade-crossing regulations. Further, unlike the FHWA's official ruling, the 1989 letter did not purport to be an interpretation of the FHWA's Manual or regulations. The letter therefore provides no basis for discounting the FHWA's official ruling that retroreflective tape is not a traffic control device. Moreover, the 1989 letter cautions that the tape is "not intended to be used in lieu of upgrading when it is warranted." *Id.* at 115a.

D. The Texas Supreme Court Disregarded The Presumption Against Preemption

This Court has made it clear that state law is preempted only in the limited circumstances where § 646.214(b)(3) and (4) apply and "cover" the subject matter of state law. *Easterwood*, 507 U.S. at 670-71. In so holding, the Court relied on the principle that "a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *Id.* at 664. In that regard, the Court followed the position advocated by the United States, which explained that "[p]roviding compensatory remedies through the mechanism of the tort system is undoubtedly within the States' historic police power" and that state law had historically required railroads to exercise a duty of care to make crossings safe. U.S. *Easterwood* Br. at 14-15. This Court recently has reaffirmed the importance of the presumption against preemption. *See, e.g., Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009); *Altria Group,*

Inc. v. Good, 129 S. Ct. 538, 543 (2008). And it has made clear that the presumption applies to the interpretation of a federal regulation. *See, e.g., Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715-16 (1985).

The Texas Supreme Court ignored this Court's guidance regarding the reluctance to find preemption. Instead, it reversed the presumption, going out of its way to bend inapplicable definitions and provisions of the Manual and the Handbook to preempt petitioners' claims. The court's reasoning contradicted the plain language and structure of the relevant regulations, as well as the implementing agency's official interpretation of those regulations. It identified nothing sufficient to overcome the presumption against preemption. *Cf. Bates*, 544 U.S. at 449 ("Even if Dow had offered us a plausible alternative reading . . . – indeed, even if its alternative were just as plausible as our reading of that text – we would nevertheless have a duty to accept the reading that disfavors pre-emption.").

III. THIS CASE PRESENTS A RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE WARRANTING THE COURT'S IMMEDIATE RESOLUTION

Whether the federally funded addition of a component to an existing warning device preempts state-law claims arising from accidents at railway-highway crossings is a question of importance to public safety nationwide. The conflict between the Texas Supreme Court and the Eighth Circuit and the highest courts of South Dakota and Louisiana demonstrates the confusion in the law regarding the proper standard for determining preemption in this context. Furthermore, three federal district courts and the Texas Su-

preme Court already have considered the preemptive effect of the same 1989 program – confirming that the issue is one of recurring importance, particularly in light of the fact that Texas is one of several States with a disproportionately high share of accidents at railway-highway crossings.[23] The question presented is ripe for this Court's review, and this case presents an ideal vehicle in which to resolve it.

A. The Standard For Preemption Of State-Law Tort Claims For Inadequate Warning Devices Affects Hundreds Of People Who Are Injured Or Killed At Railway-Highway Crossings Each Year

The United States has approximately 139,862 public grade crossings.[24] More than 55,000 public grade crossings are equipped with crossbuck warning devices.[25] In 2007, there were 2,205 motor vehicle incidents at public grade crossings,[26] and public railway-highway crossings incidents resulted in 299 deaths and 817 injuries.[27] In addition, railway-

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[23] *See* Office of Inspector General, U.S. Dep't of Transp., *Audit of the Highway-Rail Grade Crossing Safety Program*, Report No. MH-2004-065, at 4 (June 16, 2004), *available at* http://www.oig.dot.gov/sites/dot/files/pdfdocs/mh2004065.pdf (noting that, from 1994 to 2003, California, Illinois, Indiana, Louisiana, Ohio, and Texas had the most public grade-crossings accidents).

[24] *See* FHWA, U.S. Dep't of Transp., *Facts and Statistics*, *at* http://safety.fhwa.dot.gov/xings/xing_facts.cfm ("FHWA Facts and Statistics").

[25] *See* Office of Safety Analysis, Federal Railroad Admin., U.S. Dep't of Transp., *Railroad Safety Statistics: 2007 Final Annual Report*, Table 9-3 (Apr. 2009), *available at* http://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Publications.aspx.

[26] *See id.* at Table 7-1.

[27] *See* FHWA Facts and Statistics.

highway crossing collisions are particularly severe. In 2002, while one of out every 149 vehicle collisions resulted in a fatality, one out of every *ten* crossing collisions resulted in a fatality.[28]

Those statistics demonstrate the unfortunate fact that accidents at railway-highway crossings remain common. As the cases discussed in Part I of the petition show, an oft-litigated question in suits by injured victims and their families to recover for the negligent failure of railroads to provide adequate warning devices is whether a federally funded program to maintain or upgrade a crossing preempts any claim of negligence by the railroad in providing warnings at that crossing. Without this Court's intervention, lower federal and state courts will continue to reach disparate results on similar facts, undermining both the uniformity of federal law and the FRSA's purpose of "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 49 U.S.C. § 20101.

In urging the court below to grant discretionary review in this case, *amici* supporting respondent attested to the importance of the question presented. The Association of American Railroads ("AAR") asserted that "the question of what constitutes a warning device is an important and recurring issue" and that "the issues raised in this case will likely recur with great frequency." AAR *Amicus* Br. at 4, 12 (Tex. filed May 3, 2006). Similarly, *amicus* BNSF Railway Company contended that "[f]ederal preemption is the

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[28] *See* 2007 FHWA Handbook at 4; *see also* FHWA Facts and Statistics (noting that, "[w]hile the number of railroad grade crossing fatalities, injuries, and crashes are small in comparison to others, these incidents have the potential of catastrophic consequences").

critical threshold issue for grade crossing suits in courts throughout the United States." BNSF *Amicus* Br. at 3 (Tex. filed Apr. 25, 2006). It further explained that "grade crossings have such a pervasive presence on the rail network *across the nation*" that "the establishment and preservation of clear and uniform rules outlining the various duties of the entities having interests in public grade crossing safety . . . is essential." *Id.* at 2 (emphasis added).

B. The Question Presented Is Ripe For The Court's Review, And This Case Is An Ideal Vehicle For Resolving It

Numerous state and federal courts, including the highest courts of three States and the Eighth Circuit, have addressed the question of what constitutes a warning device sufficient to support preemption under this Court's decisions. The conflict between the decision below and the decisions of multiple other state and federal courts demonstrates the confusion in the lower courts over the proper standard for preemption under *Easterwood* and *Shanklin*. Furthermore, the same 1989 program at issue in this case has now been squarely considered by several federal district courts in Texas, as well as the Texas Supreme Court. The conflict that has arisen is well-developed and requires this Court's resolution, both to clarify federal law nationwide and to remove the incentive to engage in forum shopping among state and federal courts in Texas.

There is no preliminary or threshold issue that this Court would have to decide before reaching the question presented. The parties and courts below have assumed that federal funds were used to apply the retroreflective tape in question, eliminating the often-complicated factual issue of determining whether

federal funds actually were used at the crossing in question.

Nor is there any alternative ground for affirming the judgment. Although respondent argued below that preemption was appropriate under a separate 1977 program, the state court of appeals rejected that contention, and the Texas Supreme Court declined to address it. Thus, this case cleanly presents an important issue of law warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 15, 2010

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SUPREME COURT OF TEXAS

No. 06-0023

MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

PATRICIA LIMMER, BILLYE JOYCE SMITH, AND BOBBY JEAN NOTHNAGEL,
Respondents.

Argued November 13, 2007

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT joined.

JUSTICE O'NEILL and JUSTICE GUZMAN did not participate in the decision.

In this wrongful death action arising out of a truck-train collision, the plaintiffs claim that crossbucks – the familiar black-and-white, X-shaped signs that read "RAILROAD CROSSING"[1] – provided inadequate warning for the railroad crossing and that the railroad was negligent in failing to remove a gravel pile

[1] U.S. DEP'T OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, at Table 2A-4 (2003) (Use of Sign Shapes), *available at* http://mutcd.fhwa.dot.gov/pdfs/2003r1r2/mutcd2003r1r2complet.pdf [hereinafter MANUAL].

and vegetation that restricted drivers' view of approaching trains. The railroad contends that federal law preempts these claims. When railroad crossing improvements are federally funded, federal regulations specify what warning devices must be used,[2] and the United States Supreme Court has held that section 20106 of the Federal Railroad Safety Act of 1970[3] expressly preempts state tort law actions challenging the adequacy of those devices.[4] The trial court concluded that federal regulations do not apply in this case, and the court of appeals affirmed.[5] We disagree and accordingly reverse the judgment of the

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[2] 23 C.F.R. § 646.214(b)(3)-(4).

[3] Pub. L. No. 91-458, § 205, 84 Stat. 971, 972 (1970), recodified as amended at 49 U.S.C. § 20106 (2006). A 2007 amendment, "clarifying railroad preemption", retroactive only to 2002, does not apply here. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53 § 1528 ("Railroad Preemption Clarification"), 121 Stat. 265, 453 (applicable to "all pending State law causes of action arising from events or activities occurring on or after January 18, 2002"); *see Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1214-216 (10th Cir. 2008).

[4] *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000) (the Federal Railroad Safety Act of 1970, 84 Stat. 971, as amended, 49 U.S.C. § 20101 et seq., in conjunction with the Federal Highway Administration's regulations addressing adequacy of warning devices installed with federal funds, 23 C.F.R. §§ 646.214(b)(3) and (4) (1999), preempts state tort actions concerning a railroad's failure to maintain adequate crossing warning devices when federal funds have participated in the devices' installation); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 671 (1993) (holding that, under the FRSA and federal regulations, only excessive speed claims were preempted; claims arguably involving *Manual* standards were not "covered" by federal regulations, and claims based on the railroad crossing were not preempted, given the failure to establish participating federal funds).

[5] 180 S.W.3d 803 (Tex. App.–Houston [14th Dist.] 2005).

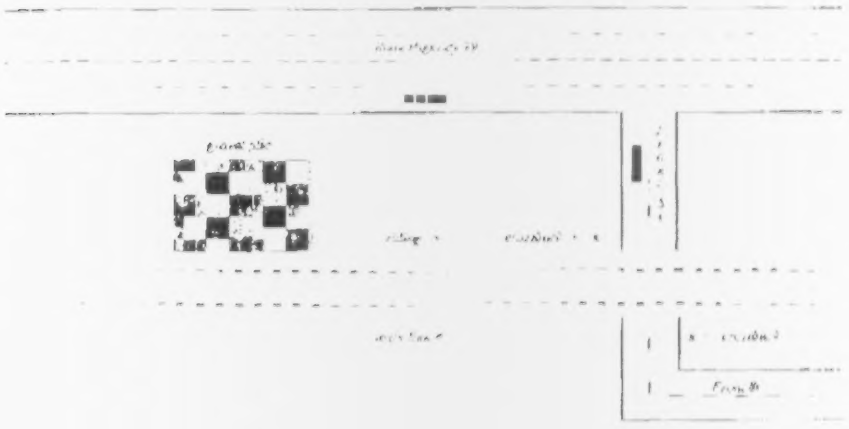
court of appeals and render judgment that the plaintiffs take nothing.

I

A

In late 1990, Billy Howard Limmer and his wife Patricia bought a home in Thorndale, a small central Texas farming community (1 sq. mi., 1990 pop. 1,092), where they intended to live after Limmer retired in March 1994. They attended Thorndale High School, married, and moved away to work, but often returned to visit family in the area.

The Union Pacific Railroad runs through the middle of Thorndale east and west, parallel to and just south of state highway 79. On average, some two dozen trains pass through Thorndale every day. The tracks cross several streets, including Front Street, which runs south from the highway, then turns east and continues along the south side of the tracks. The following schematic illustrates the site:



At the Front Street crossing,[6] near the highway, there are two sets of standard gauge tracks (*i.e.*, 4' 8-1/2" wide) about 10' apart. The tracks farthest from the highway are the main line, on which trains can travel up to 60 mph. The tracks nearer the highway are for a siding.[7] The crossing is very rough and bumpy, and vehicles must take it very slowly. A crossbuck stands 64' – three or four car-lengths – from the highway, 14' before the siding. A second crossbuck is located on the other side of the main line, facing traffic coming from the opposite direction. There are no other warning devices. Trains sound their horns to signal their approach. In April 1994, a pile of gravel as big as a house – some 14' high and 100' long – lay alongside the siding about 160' west of the crossing. The gravel pile restricted a driver's view westward, as did vegetation growing in the railroad right-of-way, but a driver could still see more than 200' down the tracks to the west.

Just after 5:00 p.m. on April 26, 1994, Limmer drove his pickup south on a town street to highway 79, turned left going east, then turned right a block or two later off the highway onto Front Street. Eyewitnesses heard the horn of an eastbound train approaching at 40-50 mph and watched as Limmer drove very slowly down Front Street, across the siding, and into its path. Limmer was killed instantly.

B

Patricia Limmer and her two daughters sued the Union Pacific. We refer to the parties as the Limmers and the Railroad. As an affirmative defense,

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[6] Texas Department of Transportation Crossing No. 446 546V.

[7] A siding is an "auxiliary track for meeting or passing trains." 49 C.F.R. § 236.802a.

the Railroad asserted that the Limmers' claims were expressly preempted[8] by the Federal Railroad Safety Act of 1970 (FRSA).[9] Congress enacted FRSA "to promote safety in all areas of railroad operations and to reduce railroad-related accidents and injuries to persons".[10] FRSA calls for "[l]aws, regulations, and orders related to railroad safety [to] be nationally uniform to the extent practicable."[11] To that end, FRSA authorizes the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety"[12] and provides in section 20106 that a "State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement . . . ."[13] In two

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[8] U.S. CONST. art. VI, cl. 2 ("The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *Altria Group, Inc. v. Good*, 555 U.S. ___, ___ (2008) ("[W]e have long recognized that state laws that conflict with federal law are without effect." (internal quotation marks and citation omitted)); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001) ("A federal law may expressly preempt state law.").

[9] Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 49 U.S.C. §§ 20101 *et seq.* (2006 & Supp. 2008).

[10] Pub. L. No. 91-458 § 101, 84 Stat. 971.

[11] *Id.* § 20106(a)(1).

[12] *Id.* § 20103(a).

[13] *Id.* § 20106(a)(2). Subsection (a)(2) continues with an exception regarding essentially local safety hazards that is inapplicable here.

cases, *CSX Transportation, Inc. v. Easterwood*[14] and *Norfolk Southern Railway v. Shanklin*,[15] the United States Supreme Court has held that under section 20106, federal regulations "covering the subject matter" of a railroad safety requirement of state law preempt state law, including common law tort liability.[16] The accident in *Shanklin* was very similar to the one in this case: the deceased drove his truck into the path of an oncoming train at a crossing marked only by crossbucks.[17]

The Highway Safety Act of 1973 (HSA) grants federal funding to states to "eliminat[e] . . . hazards of railroad-highway crossings".[18] In return, HSA requires each state to "conduct and systematically maintain a survey of all highways and identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose."[19] Under the authority of both FRSA and HSA, the Secretary of Transportation, through the Federal Highway Administration (FHWA),[20] has promulgated numerous regulations, including several addressing

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[14] 507 U.S. 658 (1993).

[15] 529 U.S. 344 (2000).

[16] *Shanklin*, 529 U.S. at 357-358; *Easterwood*, 507 U.S. at 670-671.

[17] *Shanklin*, 529 U.S. at 350.

[18] Pub. L. No. 93-87, §§ 201, 203, 87 Stat. 282, 282-283 (see note following 23 U.S.C. § 130); *Shanklin*, 529 U.S. at 348; *Easterwood*, 507 U.S. at 662-663.

[19] Pub. L. No. 93-87, § 203, 87 Stat. 282, 282-283 (codified as amended at 23 U.S.C § 130(d)).

[20] 49 C.F.R. § 1.48(b)(1).

the installation of warning devices at railroad crossings.

The regulations at 23 C.F.R. § 646.214(b)(3) & (4) govern the design of grade crossing improvements for federally funded railroad-highway projects. We will refer to them as the "Grade Crossing Design" regulations. Subsection (b)(3) requires adequate warning devices that include automatic gates with flashing light signals if any of six enumerated conditions is present.[24] Where none is present, subsection (b)(4) states that "the type of warning device to be installed, whether the determination is made by a

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[24] Subsection (b)(3) states:

"(3)(i) Adequate warning devices, under § 646.214(b)(2) or on any project where Federal aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

"(A) Multiple main line railroad tracks.

"(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

"(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

"(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

"(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

"(F) A diagnostic team recommends them.

"(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable."

State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of the FHWA." According to the Supreme Court, when subsections (b)(3) and (b)(4) apply, the Secretary "has determined the devices to be installed and the means by which railroads are to participate in their selection."[22] These regulations therefore "cover the subject matter of state law which, like the tort law . . . , seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings",[23] and thus preempt common law tort liability for a claim that a warning device installed at a railroad crossing was inadequate.[24]

The Limmers do not contend that any of the six conditions described in subsection (b)(3) was present

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[22] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 671 (1993); *see also Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 357 (2000) ("When the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject.").

[23] *Easterwood*, 507 U.S. at 671.

[24] *Shanklin*, 529 U.S. at 357-358 ("Sections 646.214(b)(3) and (4) 'cover the subject matter' of the adequacy of warning devices installed with the participation of federal funds. As a result, the FRSA pre-empts [a] state tort claim that the advance warning signs and reflectorized crossbucks installed at [a] crossing were inadequate."); *Easterwood*, 507 U.S. at 670-671 ("In short, for projects in which federal funds participate in the installation of warning devices, the Secretary [of Transportation] has determined [in 23 C.F.R. § 646.214(b)(3)-(4)] the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.").

at the Front Street crossing. Thus, subsection (b)(4) applies to any warning device installed there using federal funds.[25] The Railroad offered evidence of two federally funded programs to improve railroad crossings in Texas. The purpose of the first, implemented between 1977 and 1981, was to install or upgrade crossbucks at certain crossings using metal, reflectorized signs. The Railroad participated in the program, but it had more than 3,100 crossings in Texas at the time, and the Limmers contend that the evidence falls short of establishing that the crossbucks at the Front Street crossing were installed as part of the program. The second program, authorized by the Legislature in 1989,[26] involved attaching retroreflective tape to the pole and back of the blades of every crossbuck in Texas. Retroreflective material reflects light back in the direction of its source. Thus, when a vehicle's lights shine on an object marked with retroreflective material, the light is reflected back toward the vehicle, causing the object to appear brighter to the driver. The Limmers do not dispute that federal funds helped pay for the tape on the crossbucks at the Front Street crossing,[27] but they contend that the improvement did not amount to the installation of

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[25] *Shanklin*, 529 U.S. at 353-354 (subsections (b)(3) and (b)(4) "apply to 'any project where Federal-aid funds participate in the installation of the devices'" (quoting 23 C.F.R. § 646.214(b)(3)(i) (1999))); *Easterwood*, 507 U.S. at 670-672.

[26] Act of May 17, 1989, 71st Leg., R.S., ch. 269, 1989 Tex. Gen. Laws 1212.

[27] At oral argument, counsel for the Limmers was asked: "Could I be sure that you do agree that federal funds were spent on the installing the tape?" To which counsel responded: "We do, your Honor."

a warning device within the meaning of the federal regulations.

C

The jury found Limmer and the Railroad both negligent in causing the collision and apportioned responsibility 15% to Limmer and 85% to the Railroad. The jury found the Railroad negligent in two respects: in failing to provide additional warning devices – automatic signals, a flag man, or a stop sign – at an extra-hazardous crossing; and in answer to a separate question, in failing to eliminate the sight restriction caused by the gravel pile or vegetation. The jury awarded compensatory damages totaling $6 million. The preemption defense was tried, without objection, to the bench, and the evidence was offered outside the presence of the jury. The trial court rejected the defense without making any findings of fact and rendered judgment on the verdict.

On appeal, the Railroad argued that it had established its preemption defense, and that a failure to eliminate sight restrictions at the crossing was not an independent basis for liability.[28] The Railroad acknowledges that it had the burden to prove preemption, that the trial court presumably resolved all factual disputes against preemption,[29] and that it must therefore demonstrate that preemption has been established as a matter of law.[30] At first,

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[28] 180 S.W.3d 803, 806-807 (Tex. App.–Houston [14th Dist.] 2005).

[29] *Pharo v. Chambers County*, 922 S.W.2d 945, 948 (Tex. 1996) ("Because the trial court did not render findings of fact or conclusions of law, we must assume that it made all findings in support of its judgment . . . .").

[30] *Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) ("When a party attacks the legal sufficiency

the court of appeals reversed and rendered judgment for the Railroad, holding that preemption had been established, but on rehearing, it reversed and remanded for a new trial.[31]

Whether the crossbucks at the Front Street crossing were installed using federal funds was a factual matter, and while there may have been some evidence that the installation was federally funded, the court concluded that the documentary evidence was inconclusive and that there were reasons why the trial court could have decided not to credit the testimony of the witnesses who testified in support of the Railroad's position.[32] Thus, the court held, the Railroad had not established that basis for preemption as a matter of law. Whether the federally funded application of the retroreflective tape to the crossbucks constituted the installation of a warning device under federal law was a legal issue, and the court held it did not.[33]

Finally, the court held that a railroad's negligent failure to eliminate sight restrictions at a crossing is not an independent basis for liability for causing a collision but is merely a consideration in determining whether the railroad was negligent in warning of the crossing.[34] Thus, the trial court erred in submitting

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of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue.").

[31] 180 S.W.3d at 829.

[32] *Id.* at 811-817.

[33] *Id.* at 817-821.

[34] *Id.* at 821-828.

a separate jury question regarding sight restrictions.[35] Finding itself in doubt whether the erroneously submitted question improperly influenced the jury, the court concluded that a new trial was required.[36]

The Limmers and the Railroad petitioned for review. We granted both petitions.[37]

II

The 1989 project, one of the two projects on which the Railroad rests its preemption defense, was developed by FHWA and authorized in Texas by statute requiring what was then the State Department of Highways and Public Transportation to "develop guidelines and specifications for the installation and maintenance of retroreflectorized material at all public grade crossings not protected by active warning devices."[38] The statute broadly defined a "warning device" as "an active warning device, crossbuck, or other traffic control sign, the purpose of which is to alert motorists of a grade crossing",[39] and more specifically defined an "active warning device" as "a bell, flashing light, gate, wigwag, or other automatically activated warning device."[40] The statute also defined

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[35] *Id.* at 828.

[36] *Id.*

[37] 50 Tex. Sup. Ct. J. 801 (June 1, 2007).

[38] Act of May 17, 1989, 71st Leg., R.S., ch. 269, § 2, 1989 Tex. Gen. Laws 1212, 1213, previously codified as TEX. REV. CIV. STAT. ANN. art. 6370b, § 2, recodified by Act of May 1, 1995, 74th Leg., R.S., ch. 165, 1995 Tex. Gen. Laws 1025, 1460, now TEX. TRANSP. CODE § 471.004(a) (substituting the phrase "reflecting material" for "retroreflectorized material"). The references in notes 39-43 and 61-62 are to these enactments.

[39] *Id.* § 471.004(f)(7) (formerly art. 6370b, § 1(8)).

[40] *Id.* § 471.004(f)(1) (formerly art. 6370b, § 1(1)).

"retroreflectorized material" as "material that reflects light so that the paths of the reflected light rays are parallel to those of the incident rays."[41] The statute provided that "retroreflectorized material shall be affixed to the backs of crossbucks and their support posts in a manner that retroreflects light from vehicle headlights to focus attention to the presence of a nonsignalized crossing"[42] – that is, "a crossing not protected by active warning devices".[43] One FHWA official described the agency's research with "[r]etroreflective material installed on the backs of crossbucks and their support posts" as follows:

> These devices were located on the far side of the crossing from approaching traffic so as to retroreflect light from the vehicle headlights through the moving gaps in the train. The resulting flickering light attracts the driver's attention to the presence of a moving train at the crossing. [The] devices were visible at 200-300 feet in advance of the crossing through the gaps between train cars and wheels.[44]

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[41] *Id.* § 471.004(f)(5) (formerly art. 6370b, § 1(6)) (defining "reflecting material").

[42] *Id.* § 471.004(a) (formerly art. 6370b, § 2) (substituting the phrase "unsignaled crossing" for "nonsignalized crossing" and "reflecting material" for "retroreflectorized material").

[43] *Id.* § 471.004(f)(6) (formerly art. 6370b, § 1(4)) (defining "unsignaled crossing").

[44] Letter from Mr. Greg Scherz, Safety & Traffic Operations Coordinator, FHWA, to Mr. R.E. Stotzer, Jr., State Engineer-Director, State Dep't of Highways and Public Transportation (Jan. 17, 1989).

Texas received more than $1.3 million in federal funds for the project,[45] some of which were used to apply retroreflectorized tape to the poles and backs of the blades of the crossbucks at the Front Street crossing. The Railroad contends that this was an installation of a warning device within the meaning of subsection (b)(4) of the Grade Crossing Design regulations, preempting the Limmers' claims that the warning signs at the crossing were inadequate.

Federal regulations distinguish between active and passive warning devices at railroad crossings, referring to both as traffic control devices.[46] Passive warning devices, the only kind involved in this case, are defined as "those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train."[47] Other than this brief, non-exclusive list of examples – "signs, markings, and other devices" – the federal regulations do not define traffic control devices. But FHWA's *Manual on Uniform Traffic Control Devices*, incorporated into its regulations,[48] defines them as

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[45] Letter from Mr. Frank M. Mayer, Div. Administrator, FHWA, to Mr. Arnold W. Oliver, State Engineer-Director, State Dep't of Highways and Public Transportation (Jan. 15, 1991) (stating that "[t]he amount of Federal funds obligated for this project is $1,371,384").

[46] 23 C.F.R. § 646.204 (2008).

[47] *Id.*

[48] 23 C.F.R. § 655.601(a) (2008); *see also* 23 C.F.R. § 646.214(b)(1) ("All traffic control devices proposed shall comply with the latest edition of the [MANUAL] . . ."); 23 C.F.R. § 655.602 ("The terms used herein are defined in accordance

"all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, or bikeway by authority of a public agency having jurisdiction."[49] And "traffic markings" are defined in FHWA's *Railroad-Highway Grade Crossing Handbook* as "[a]ll lines, patterns, words, colors, or other devices, except signs, set into the surface of, applied upon, or attached to the pavement or curbing or to the objects within or adjacent to the roadway, officially placed for the purpose of regulating, warning, or guiding traffic."[50]

Retroreflective tape attached to a crossbuck is certainly a marking used to warn traffic of railroad crossings. The point of the 1989 program was that the addition of retroreflective tape to crossbucks would provide traffic with an additional, different warning of railroad crossings, making them more visible to motorists. The retroreflective tape on the crossbucks in this case was "placed . . . adjacent to a street . . . by authority of a public agency having

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with definitions and usages contained in the [*Manual*] and 23 U.S.C. 101(a)."); *Easterwood*, 507 U.S. at 666.

[49] MANUAL, *supra* note 1, at I-1.

[50] FEDERAL HIGHWAY ADMINISTRATION, RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK 254 (2d ed., September 1986), *available at* http://www.fhwa.dot.gov/tfhrc/safety/pubs/86215/86215.pdf; *see also* Railroad-Highway Grade Crossing HANDBOOK (rev. 2d ed. August 2007), *available at* http://safety.fhwa.dot.gov/xings/com_roaduser/07010/. Both versions of the Handbook contain similar warnings at their opening pages, cautioning that although the Handbook is disseminated under the sponsorship of the Department of Transportation, the Government assumes no liability for use of its contents, its contents do not necessarily constitute official policy, and thus "report does not constitute a standard, specification, or regulation."

jurisdiction". It was thus a warning device within the meaning of subsection (b)(4) of the federal regulations.

The Limmers argue that retroreflective tape cannot be a traffic control device because it merely reflects light and does not, as their expert, K. W. Heathington, put it, "tell[] motorists to stop, to look, to observe, to turn right or to not turn right, or anything of that nature". They point out that retroreflective tape is nowhere mentioned as a traffic control device in the FHWA's *Manual*. But the *Manual* contemplates that most signs and warning devices will be retroreflective; it also mentions strips for crossbucks in several sections.[51] Markings are specifically mentioned in the federal regulations as traffic control devices. More importantly, the use of retroreflective strips on crossbuck posts and blade-backs is designed to reflect light back at motorists, to attract attention and provide an enhanced warning, which was the purpose of the 1989 program.

The Supreme Court's decision in *Easterwood* illustrates well the difference between a device that warns and one that does not. There, gates were to be installed at five adjacent crossings as part of a single project.[52] Motion-detection circuitry was installed at all five crossings and gates were installed at four of

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[51] MANUAL, *supra* note 1, in ch. 8B.01, "Signs and Markings," § 8B.03, fig. 8B-1, at 8B-1, 8B-4; *see also* § 2a.21, at 2A-14, 2A-15 (standards for retroreflective strips on sign supports); ch. 5F ("Traffic Control for Highway-Rail Grade Crossings"), § 5F.02, at 5F-1; ch. 10C, § 10C.01, fig. 10C-1, at 10C-1, 10C-2 (both also concerning use of retroreflective strips on the back of the supports and blades of crossbucks).

[52] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 671-672 (1993).

them, but the plan for gates at the fifth crossing was abandoned, and that is where the accident occurred.[53] The Supreme Court easily rejected the argument that the circuitry alone was a warning device, even though it was installed as part of a project to provide warnings at other crossings.[54] Unlike the circuitry in *Easterwood*, the retroreflective tape at the Front Street crossing actually provided motorists warning of the crossing.

The Limmers rely on a letter that their expert, Heathington, obtained from Shelley Rowe, director of FHWA's Office of Transportation Operations, shortly before trial. Heathington had written a brief letter to Rowe on June 27, 2000, enclosing two photographs of the Front Street crossing and stating, "[i]n my opinion, the tape which is used in this fashion is not a traffic control device as defined by the [*Manual*]."[55] Heathington concluded: "I am hoping that you being from FHWA can confirm this conclusion about the use of the tape."[56] Rowe's brief letter in reply, dated August 2, 2000, stated merely, "[r]etroreflective tape is not considered a traffic control device and, therefore, its use around a traffic sign post does not conflict with the standards in the [*Manual*]."[57]

The Limmers do not argue that Rowe's letter is entitled to deference, only that it provides support for Heathington's opinions. In deciding what effect to

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[53] *Id.*

[54] *Id.*

[55] Letter from K. W. Heathington to Shelley J. Rowe, Director, Office of Transportation Operations, FHWA (Aug. 2, 2000).

[56] *Id.*

[57] Letter from Shelley J. Rowe, Director, Office of Transportation Operations, FHWA, to K. W. Heathington (Aug. 2, 2000).

give Rowe's letter, we are guided by the United States Supreme Court's observations in *Skidmore v. Swift & Co.*[58] in a similar context. Regarding the views of the Administrator of the Wage and Hour Division of the U.S. Department of Labor, the Court wrote:

> We consider that the rulings, interpretations and opinions of the Administrator under [the Fair Labor Standards Act], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[59]

We have nothing to indicate that Rowe's consideration of Heathington's request was thorough. The letter contains no reasoning and no reference to authority of any kind. The conclusory opinion is accompanied by an opaque and unexplained reference to there being no conflict with the *Manual*. The letter is also in some tension with another FHWA official's letter in 1989, encouraging participation in the retroreflective tape program, repeatedly referring to the tape as a "device" and describing its use as a warning

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[58] 323 U.S. 134 (1944).

[59] *Id.* at 140.

signal. In sum, we are unable to ascribe any persuasive value to Rowe's letter.[60]

The Limmers argue that the 1989 Texas statute suggests that "retroreflectorized material" is not a warning device by defining the two terms separately.[61] The statute gives no indication that it was interpreting the meaning of the terms under federal law. But even if it did, we think the statute suggests just the opposite by providing that "[t]he cost of initial installation of retroreflectorized material shall be paid from money appropriated . . . for the purpose of maintaining grade crossing warning devices."[62]

Finally, the Limmers argue that the application of retroreflective tape to the crossbucks at the Front Street crossing was only an enhancement or maintenance of the existing signs, not an installation. We see no reason why enhancement or maintenance of an existing sign to meet FHWA requirements is anything less than approval of "the type of warning

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[60] The parties also cite three orders of federal district courts, all in Texas, which consider the preemptive effect of the 1989 program. One granted summary judgment dismissing the case, *McDaniel v. S. Pac. Transp.*, 932 F. Supp. 163 (N.D. Tex. 1995); the other two denied summary judgment in unpublished orders, *Lesly v. Union Pac. R.R. Co.*, No. H-03-0772, 2004 U.S. Dist. LEXIS 23018 (S.D. Tex. June 25, 2004); *Enriquez v. Union Pac. R.R. Co.*, No. 5:03-CV174, 2004 U.S. Dist. LEXIS 28989 (E.D. Tex. Dec. 30, 2004) (holding that, in the same sense that the pole of a crossbuck sign is not a passive warning device, the tape, without more, is not a passive warning device under 23 C.F.R. § 646.204, and that, under *Shanklin*, it was irrelevant whether the tape met *Manual* standards). None provides persuasive authority for our decision today.

[61] TEX. TRANSP. CODE §§ 471.004(f)(5) & (7) (formerly art. 6370b, §§ 1(6) & (8)) (defining "reflecting material").

[62] *Id.* § 471.004(b) (formerly art. 6370b, § 3).

device to be installed" within the meaning of subsection (b) of the Grade Crossing Design regulations. Even if enhancement or maintenance were not "approval", the retroreflective tape was itself a warning device, and its addition to the existing crossbucks an installation.

Accordingly, we conclude as a matter of law that the application of retroreflective tape to the crossbucks at the Front Street crossing was an installation of a federally funded and approved warning device. The Limmers acknowledge that if the 1989 program was covered by subsection (b)(4) of the Grade Crossing Design regulations, their inadequate warning claims were preempted by section 20106 of FRSA. We therefore need not consider the Railroad's other basis for preemption, that federal funding of the 1976 program was conclusively established.

III

The Limmers contend that the Railroad had a duty to keep the crossing free of obstructions restricting sight of approaching trains, and that breach of that duty was negligence for which the Railroad is liable, irrespective of the adequacy of the warning at the crossing. More than a century ago, we held that there is no such duty; rather, the presence of sight-restricting obstructions is but a consideration in determining whether the operation of the train was negligent.

In 1897, in *Missouri, Kansas & Texas Railway Co. of Texas v. Rogers*, the plaintiff had just begun to drive his wagon over a railroad street crossing when suddenly he saw that boxcars were being pushed toward him, and he leapt from the wagon to get out

of the way, thereby injuring himself.[63] He alleged that, in attempting to cross the tracks, his view had been obstructed by a coal house, an ice house, and a beer house, which the railroad should not have allowed to be built on its right-of-way, and by a box-car, which should not have been left standing on a siding.[64] The jury, having been instructed that the railroad had a "duty . . . to use ordinary care . . . to avoid such obstructions on its right of way and side tracks . . . as would prevent persons crossing . . . to discover the approach of trains", found for the plaintiff, and the trial court rendered judgment on the verdict.[65] We reversed and remanded the case for a new trial with this explanation:

> The charge of the court assumes that it was the duty of the railroad company, as a matter of law, to prevent the obstruction of the view of its track at the place indicated, and that the failure to perform that duty was negligence per se, for which the plaintiff was entitled to recover, without regard to the care with which the train was operated at the time. It was error in the court to so charge the jury. Whether the obstruction was placed upon the right of way by the company itself for its own use, or permitted by it to be placed there by another to be used in connection with the business of the road, is unimportant. There is no law which declares it to be the duty of a railroad company to keep its right of way free from obstruction, and therefore the failure to do so cannot be declared as a matter of law to

[63] 40 S.W. 956, 957 (Tex. 1897).

[64] *Id.*

[65] *Id.*

be negligence. . . . [T]hose obstructions, with the other surrounding circumstances, were proper to be considered upon the question of the degree of care and vigilance which the defendant was bound to exercise in the running and management of its train, and in giving warning of its approach. It cannot be an independent ground of recovery. . . . The fact that the view of the track was obstructed would not give a right of action if the railroad company exercised such care in the operation of its train as a prudent person, under similar circumstances, having due regard for the safety of those traveling upon the highway over that road, would have exercised. It might be that the ringing of a bell, or the blowing of a whistle, or both, would not be such care as would be required at that place. A prudent man might have felt it his duty to station some person there to give warning of the approach of a train to those who were about to cross the track. But the question to be submitted to the jury was whether or not, under the surrounding conditions and circumstances at that place, the defendant exercised such care as a prudent person would have exercised under like conditions.[66]

In 1898, in *International & Great Northern Railway Co. v. Knight*, a wagon driver was killed in a railroad crossing collision.[67] The plaintiff alleged that the railroad was at fault both in failing to signal the train's approach and in allowing various structures to be placed along the tracks, obstructing the

[66] *Id.* at 957-958 (internal quotation marks omitted).

[67] 45 S.W. 556 (Tex. 1898).

view.[68] The trial court instructed the jury that they could find the railroad negligent on either ground and rendered judgment on a verdict for the plaintiff.[69] As in *Rogers*, we reversed and remanded the case for a new trial, holding that the jury had been improperly instructed.[70] Again we explained:

> In [*Rogers*], we held that it is not negligence for a railroad to put on its right of way obstructions to the view of one approaching a crossing, whether the obstructions be placed there by the railroad for its own use, or by another, by the railroad's permission, to be used in connection with the business of the road; but it is merely a matter to be considered on the question whether there was negligence in the operation of a train at the crossing. It is obvious in the present case that the obstructions which were placed near the track of the defendant company were the ordinary structures used by the company in receiving and discharging its freight. When near a crossing, such structures necessarily obstruct the view of those using the highway, in passing over the track. From the very nature of the case, at every depot of a railway company the view of approaching trains must in some measure be shut off by the buildings which are requisite to the transaction of its business; and hence the erection and maintenance of such buildings cannot, on account of their obstructing the view of the track, be deemed negligence either in law or in fact.[71]

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[68] *Id.*

[69] *Id.* at 557.

[70] *Id.* at 558.

[71] *Id.* at 557.

The Limmers argue that five cases decided before *Rogers* and *Knight* support a duty to clear railroad crossings of sight-restricting obstructions. One of the cases holds that a railroad has a duty to its own employees to clear its tracks and right-of-way of obstructions that could derail the train and injure them.[72] Another extends the same duty to passengers.[73] Neither discusses a railroad's duty to highway traffic to remove obstructions that restrict sight. The other three cases[74] were cited in *Rogers* as authority for our holding in that case.[75] Granted, those cases could have been read to create some uncertainty on the subject,[76] but *Rogers* removed that uncertainty.

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[72] *Texas & St. Louis Ry. Co. v. Vallie*, 60 Tex. 481 (1883) (holding that a railroad was negligent in allowing a tree to fall across its tracks, derailing a train, and injuring its employee).

[73] *Eames v. Tex. & New Orleans Ry. Co.*, 63 Tex. 660 (1885) (holding that a railroad was negligent in failing to clear vegetation from its right-of-way, from which a cow emerged in front of a train, derailing it and injuring a passenger).

[74] *Galveston, Houston & San Antonio Ry. Co. v. Michalke*, 38 S.W. 31 (Tex. 1896); *Receivers Houston & Tex. City Ry. Co. v. Stewart*, 17 S.W. 33 (Tex. 1891); *Dillingham v. Parker*, 16 S.W. 335 (Tex. 1891).

[75] *Rogers*, 40 S.W. at 958.

[76] In *Dillingham*, we held that the trial court misstated the law in instructing the jury that "[i]t is the duty of those operating railway locomotives and cars to use reasonable care not to permit the view of the track to become obstructed with cars standing on the side tracks, so that persons passing along a public road or street cannot conveniently see and hear a passing engine or train, as they approach the crossing of the track". 16 S.W. at 335-336. But we added that "[i]t was for the jury to say, under proper instructions, whether *the particular acts* were negligent or not." *Id.* at 336. In *Stewart*, we said: "The [railroad], under the law, ha[s] the right to use [its] road in the exercise of its legitimate business, but the enjoyment of this privi-

The Limmers contend that, even if nineteenth century case law was to the contrary, public policy now favors imposing on railroads an independent duty to prevent sight obstructions at crossings. They point to state[77] and federal[78] regulations requiring

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lege does not authorize [it] to exercise this right in a negligent manner. It cannot be said, as a matter of law, that the legitimate use of the side tracks of a railroad, in storing its cars or switching its trains, is or is not negligence. Whether or not it be negligence would depend upon the manner of use and the circumstances attending it." 17 S.W. at 33. And in *Michalke*, we said: "[W]e do not question the right of a railway company, as a general rule, to erect the structures necessary for the prosecution of its business, and to leave standing cars upon its side tracks, near a street or road crossing. But we think that the circumstances of a case may be such that, as a matter of fact, it may be negligence to do so." 38 S.W. at 31.

[77] 43 TEX. ADMIN. CODE § 7.37(b)-(d) (2009) ("(b) Standing equipment. No railroad shall cause or allow trains, railway cars, or equipment to stand less than 250 feet from the centerline of any unprotected public grade crossing unless a closer distance cannot be avoided. (c) Vegetation. At unprotected public grade crossings, each railroad shall control vegetation on its right-of-way (except for the roadbed and areas immediately adjacent to the roadbed) for a distance of 250 feet each way from the centerline of the crossings, so that vegetation does not block the vehicular highway traffic's view of approaching trains. The 250 feet shall be measured from the point where the centerline of the railroad crosses the centerline of the public road. Where the right-of-way is fenced, this subsection shall be deemed complied with if vegetation is controlled up to two feet from the fence. (d) Permanent structures. At unprotected public grade crossings, each railroad shall keep its right-of-way clear of unnecessary permanent obstructions, such as billboards and signs that are not authorized by the railroad and that are not required for the safe operation of the railroad, for a distance of 250 feet each way from the crossing so that the obstructions do not block the vehicular highway traffic's view of approaching trains. Billboards and signs that are legally permitted by the state or a political subdivision are not unnecessary permanent obstruc-

railroads to keep right-of-ways clear. But thorough regulations do not invite an additional cause of action for negligence; they suggest one is unnecessary. The Association of American Railroads, as amicus curiae, cites data indicating that the regulation of railroad crossings has, from 1980 to 2004, coincided with a 71% decrease in collisions and a 56% decrease in collision fatalities.[79] Public policy does not require us to disturb a positive regulatory scheme.

We reaffirm that a railroad's duty is not to clear its right-of-way of things that may obstruct sight at a crossing; a railroad's duty is to give adequate warning of approaching trains, given whatever obstructions or other conditions exist. The Limmers do not contend that the obstructions at the Front Street crossing made even active warnings, like automatic

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tions, so long as they do not block the vehicular highway traffic's view of approaching trains. Permanent buildings, such as warehouses and equipment facilities, which existed prior to June 26, 1986, are exempt from the requirements of this subsection. The 250 feet shall be measured from the point where the centerline of the railroad crosses the centerline of the public road.").

[78] 49 C.F.R. § 213.37 ("Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not: (a) Become a fire hazard to track-carrying structures; (b) Obstruct visibility of railroad signs and signals: (1) Along the right-of-way, and (2) At highway-rail crossings; (This paragraph (b)(2) is applicable September 21, 1999.) (c) Interfere with railroad employees performing normal trackside duties; (d) Prevent proper functioning of signal and communication lines; or (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.").

[79] Brief of Ass'n of American Railroads as Amicus Curiae at 4-5, *Missouri Pac. R.R. v. Limmer*, No. 06-0023 (Tex. May 3, 2006) (citing Federal Railroad Administration, Highway/Rail Crossing Accident/Incident Bulletin, 1980-1996).

gates or a flagman, inadequate. On the contrary, they contend that the presence of the obstructions made the warning afforded by the crossbucks inadequate. Thus, the Limmers' sight-restriction claim is simply a restatement of its claim that the warning at the crossing was inadequate. As such, it is preempted.

* * *

Accordingly, the judgment of the court of appeals is reversed and judgment is rendered that the Limmers take nothing.

/s/ NATHAN L. HECHT
Nathan L. Hecht
Justice

Opinion delivered: October 23, 2009

IN THE FOURTEENTH COURT OF APPEALS
STATE OF TEXAS

No. 14-02-00688-CV

MISSOURI PACIFIC RAILROAD COMPANY
D/B/A UNION PACIFIC RAILROAD COMPANY,
Appellant,

V.

PATRICIA LIMMER, BILLYE JOYCE SMITH,
AND BOBBY JEAN NOTHNAGEL,
Appellees.

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 95-42790

OPINION ON REHEARING

Upon consideration of the motion for rehearing filed by appellees Patricia Limmer, Billye Joyce Smith, and Bobbye Jean Nothnagel (collectively referred to herein as the "Limmers") and the responses thereto, we conclude that the trial court did not err in ruling against appellant Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company ("Union Pacific") as to its preemption defense. Accordingly, we grant the Limmers' motion for rehearing to this extent, deny the remainder of the Limmers' motion for rehearing, withdraw the opinions issued in this case on October 5, 2004, and issue the following opinion in their place.

In this wrongful-death action arising from a collision between decedent Billy Limmer's truck and a train at a railroad crossing, this court must determine whether the trial court erred in rejecting Union Pacific's defense that federal law preempts the Limmers' negligence claims. We conclude the trial court did not err in rejecting Union Pacific's preemption defense because there is legally and factually sufficient evidence to support the trial court's implied finding that Union Pacific failed to prove federal funds were used to install warning devices at the railroad crossing in question. We further conclude the trial court reversibly erred in submitting to the jury the Limmers' negligence claim based on Union Pacific's alleged failure to eliminate sight restrictions along its right-of-way because Texas law does not recognize this claim. Accordingly, we reverse the trial court's judgment and remand this case to the trial court for a new trial consistent with this opinion.

I. Factual and Procedural Background

On April 24, 1994, a train struck and killed Billy Limmer when he attempted to cross railroad tracks[1] at the Front Street grade crossing in Thorndale, Texas ("Front Street Crossing"). When this accident occurred, Georgetown Railroad Company owned this train, and Southern Pacific Railroad Company ("Southern Pacific") operated it. Furthermore, at the time of this accident, Union Pacific owned the railroad tracks in question. At the time of the accident, the Front Street Crossing did not have automatic warning devices, which activate when a train ap-

[1] The tracks had previously been owned by Missouri Pacific Railroad Company, but that company was subsequently acquired by Union Pacific Railroad Company. At the time of the accident, Union Pacific owned the tracks.

proaches the crossing; rather, it had passive warning devices, including what are referred to as "crossbuck" signs – the familiar, white, X-shaped signs with black letters spelling out, "RAILROAD CROSSING." There was testimony at trial that trees and vegetation in the area of the crossing obscured visibility along the tracks at the time of the accident. Also, further down the track, there was a pile of crushed limestone to be used for construction work.

Billy Limmer's heirs, the Limmers, sued Union Pacific for negligence. The jury found that the Front Street Crossing was "extra-hazardous" (Question 1),[2] that Union Pacific's negligence in failing to provide automatic signals, a flag man, "and/or" a stop sign was a proximate cause of the collision (Question 2),[3] and that Union Pacific's negligence in failing to eliminate sight restrictions caused by the limestone pile "and/or" the vegetation was a proximate cause of the

[2] Question 1 defined an extra-hazardous crossing as follows:

> A railroad grade crossing is "extra-hazardous" when, because of surrounding conditions, it is so dangerous that person [sic] using ordinary care cannot pass over it in safety without some warning other than the usual cross buck [sic] sign.

[3] Question 2 was conditioned on an affirmative response to Question 1 and stated as follows:

> Was the negligence, if any, of the Missouri Pacific Railroad, through its agents or employees, a proximate cause of the collision in question?
>
> In answering this question, you may consider only the following acts of negligence, if any: (1) failure to provide automatic signals (such as flashing lights or gates); (2) failure to provide a flag man at the Front Street crossing; and/or (3) failure to install a stop sign.

collision (Question 3).[4] The jury found that Billy Limmer's negligence was also a proximate cause of the accident, and it assigned proportionate responsibility for the collision at eighty-five percent to Union Pacific and fifteen percent to Billy Limmer. The jury returned separate compensatory damage awards for each of the Limmers. In its judgment, the trial court applied the proportionate-responsibility percentage to the jury's damage findings and awarded the Limmers a total amount of $8,733,458.70 plus post-judgment interest.

II. Issues Presented

On appeal, Union Pacific presents the following issues for review:

(1) Did the trial court err in rejecting Union Pacific's preemption defense because Union Pacific conclusively proved as a matter of law that federal funds were expended to install warning devices at the Front Street Crossing, or, alternatively, is the trial court's implied finding that this did not occur against the great weight and preponderance of the evidence?

(2) Did the trial court reversibly err by submitting Union Pacific's alleged failure to eliminate sight restrictions as an independent basis of liability?

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[4] Question 3 provided as follows:

> Was the negligence, if any, of the Missouri Pacific Railroad, through its agents or employees, a proximate cause of the collision in question?
>
> In answering this question, you may consider only the following acts of negligence: (1) failure to eliminate a sight restriction, if any, caused by a pile of crushed limestone at the crossing; and/or (2) failure to eliminate a sight restriction, if any, caused by vegetation at or near the crossing.

(3) Did the trial court err by refusing to instruct the jury as to the statutory duty of care owed concerning visual obstructions at public grade crossings?

(4) Did the trial court err in awarding prejudgment and postjudgment interest based on delays that were *not* Union Pacific's fault?

III. Standards of Review

In the trial court, Union Pacific asserted the affirmative defense that certain federal regulations preempt all of the Limmers' claims in this case because federal funds were expended to install warning devices at the Front Street Crossing. Before we can determine the proper standard of review regarding this issue, we must determine whether it was tried to the bench or to the jury. The record is silent as to whether the parties agreed that this preemption issue would be tried to the bench rather than to the jury. Although the Limmers demanded a jury trial and paid the jury fee, the jury never heard any of the evidence or argument on the fact issue of whether federal funds were expended to install warning devices at the Front Street Crossing. The trial court admitted the documentary evidence regarding this issue for the court only, and the trial court heard the testimony on this issue outside the presence of the jury during the trial. The trial court did not mention this fact issue in the jury charge. The trial court stated several times that it, rather than the jury, would determine the preemption issue.[5] No party

[5] For example, in discussing procedural matters related to the preemption issue, the trial court stated that "[the preemption issue] is an issue that the Court is going to decide and it's not an issue that goes to the jury . . . ." The trial court also asked counsel, "[I]s [the resolution of the preemption issue]

objected to this procedure or indicated to the trial court that it was standing on its right to a jury trial.[6] On appeal, the Limmers do not assert that this preemption issue had to be tried to the jury or that Union Pacific waived its preemption defense by not having its preemption proof admitted in evidence before the jury. On this record, we conclude Union Pacific and the Limmers waived any right they had to have the jury decide whether federal funds were expended to install warning devices at the Front Street Crossing. *See Massey v. Galvan*, 822 S.W.2d 309, 318-19 (Tex. App.–Houston [14th Dist.] 1992, writ denied) (stating that a party who has paid the jury fee and properly requested a jury waives its right to a jury trial by proceeding with a trial to the bench); *Sunwest Reliance Acquisitions Group, Inc. v. Provident Nat. Assur. Co.*, 875 S.W.2d 385, 386-88 (Tex. App.–Dallas 1993, no writ) (holding that party waived right to jury trial by allowing the trial court to conduct a bench trial without objecting or indicating to the trial court that it was standing on its perfected right to a jury trial).

Although the trial court filed no findings of fact or conclusions of law regarding the preemption issue, on

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really that different from, let's say, if they were arguing attorneys fees to me? That's something that I would be considering, not the jury."

[6] At a pretrial conference just before trial, the Limmers agreed to the trial court's granting Union Pacific a running objection to the evidence at the jury trial, so as to not waive Union Pacific's argument that federal law preempts all of the Limmers' claims. In the course of discussing this running objection, the trial court told Union Pacific's counsel, "I don't think you should have to stand up and use the word preemption at all during this case." In response, the Limmers' counsel stated, "That's fine with me, Judge."

appeal, we presume the trial court made all findings in favor of its judgment. *See Pharo v. Chambers Cty.*, 922 S.W.2d 945, 948 (Tex. 1996) (stating that, in a bench trial in which the trial court does not file findings of fact or conclusions of law, appellate courts presume the trial court made all findings in support of its judgment). Because a complete reporter's record is a part of the appellate record in this case, Union Pacific may challenge both the legal and factual sufficiency of the trial court's findings. *See Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989). We apply the same standards of review to these challenges as those applied in the review of jury findings. *See id.*

In its first issue, Union Pacific attacks the legal sufficiency and factually sufficiency of the evidence to support the trial court's implied finding that Union Pacific failed to prove federal funds were expended to install warning devices at the Front Street Crossing. This finding relates to Union Pacific's preemption defense, an issue on which Union Pacific had the burden of proof. Therefore, for Union Pacific to succeed in its legal-sufficiency challenge, we must conclude that Union Pacific conclusively proved its preemption defense as a matter of law. *See Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). In making this determination, we must consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *See id.* at 827. We must determine whether the evidence at trial would enable

a reasonable and fair-minded person to find the facts at issue. *See id.* The factfinder is the sole judge of the credibility of the witnesses and the weight to give their testimony. *See id.* at 819. Evidence is conclusive only if reasonable people could not differ in their conclusions. *See id.* at 819.

As to Union Pacific's factual-sufficiency challenge, we examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). After considering and weighing all the evidence, we set aside the fact finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *GTE Mobilnet of S. Tex. v. Pascouet*, 61 S.W.3d 599, 615-16 (Tex. App.–Houston [14th Dist.] 2001, pet. denied). We may not substitute our own judgment for that of the trier of fact, even if we would reach a different answer on the evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998). The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment. *Pascouet*, 61 S.W.3d at 616.

Union Pacific argues this court should review the trial court's rejection of its preemption arguments completely under a de novo standard of review because it claims preemption affects the trial court's subject matter jurisdiction. Under the federal system, once a state establishes certain courts as courts of general jurisdiction — such as the district court below — it is presumed that these courts have the power to adjudicate claims under federal statutes

unless otherwise provided by state or federal law.[7] *See* U.S. CONST. art. VI, cl. 2; TEX. CONST. art. V, § 8; TEX. GOV'T CODE §§ 24.007, 24.008; *Howlett v. Rose*, 496 U.S. 356, 367-69, 110 S. Ct. 2430, 2438-39, 110 L. Ed. 2d 332 (1990); *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000). The statutes and regulations at issue in this case do not contain exclusive-jurisdiction provisions. *See* 23 U.S.C. § 130 (2002); 49 U.S.C. §§ 20101-20153 (1997 & Supp. 2003); 23 C.F.R. § 646.214(b) (1999). No party has cited, and we have not found, anything in state or federal law that would deprive the trial court below of subject matter jurisdiction over the Limmers' claims in this case.

Ordinarily, preemption operates as an affirmative defense to a claimant's state law claims but does not deprive state courts of jurisdiction over those claims. *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 425 (Tex. 2005). After reviewing the statutes and regulations at issue, we conclude that there is nothing to rebut the presumption of concurrent jurisdiction and

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[7] Union Pacific cites *Cadillac Insurance Co. v. L.P.C. Distributing Co.*, 770 S.W.2d 892, 895 (Tex. App.–San Antonio 1989, writ denied), for the proposition that federal preemption is a challenge to the court's subject matter jurisdiction and, thus, is always a question of law. *Cadillac Insurance* does not hold that all preemption arguments defeat the trial court's jurisdiction. Rather, it deals with state law claims relating to an employee benefit plan under the Employee Retirement Income Security Act ("ERISA"). *Cadillac Insurance Co.*, 770 S.W.2d at 893. ERISA, unlike the statutes at issue in this case, contains a provision creating exclusive jurisdiction for the federal courts as to the issues involved in the *Cadillac Insurance* case. *See* 29 U.S.C. § 1132(e) (1999). Therefore, *Cadillac Insurance* is not on point. *See Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 427-28 (Tex. 2005) (distinguishing ERISA cases because they relied on exclusive jurisdiction provision in ERISA and because statute at issue contained no such provision).

that Union Pacific's preemption argument is not based on one of the few statutes that require claims to be resolved exclusively in a federal forum. *See Mills*, 157 S.W.3d at 425-28 (holding that Federal Food, Drug, and Cosmetic Act did not deprive state courts of jurisdiction, even if it were to provide defendants with an affirmative defense barring plaintiffs' claims, because that statute did not contain an exclusive-jurisdiction provision as does the Employee Retirement Income Security Act and there was no indication of a Congressional intent contrary to the presumption of concurrent jurisdiction as with the National Labor Relations Act); *Smallwood v. Ill. Cent. R. Co.*, 385 F.3d 568, 575-76 (5th Cir. 2004) (en banc) (noting that, in case involving state law negligence suit based on accident at railroad crossing, defendant railroad company could not remove case under federal-question jurisdiction because defendant's preemption argument was only a defense and indicating that this defense would bar claims rather than deprive state court of jurisdiction).

IV. Analysis

A. Is the evidence legally and factually sufficient to support the trial court's implied finding that Union Pacific failed to prove federal funds were expended to install warning devices at the Front Street Crossing under the 1977 Program?

In its first issue, Union Pacific asserts the evidence is legally and factually insufficient to support the trial court's implied finding that federal regulations concerning warning devices at public grade crossings do not preempt the Limmers' state law claims. *See Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347-58, 120 S. Ct. 1467, 1470-76, 146 L. Ed. 2d 374 (2000).

As to this preemption issue, Union Pacific relies on two different programs: (1) a 1977 program that sought to make sure that all public grade crossings in Texas complied with the minimum standard of the Manual on Uniform Traffic Control Devices (referred to herein as the "1977 Program"), and (2) a 1989 program to add retroreflectorized tape to the back of crossbuck signs and to their support posts (referred to herein as the "1989 Program").

Under the Supremacy Clause of the United States Constitution, federal law preempts state law when it conflicts with or frustrates federal law. U.S. CONST. art. VI, cl. 2; *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663, 113 S. Ct. 1732, 1737, 123 L. Ed. 2d 387 (1993). However, when a subject is traditionally governed by state law, a court interpreting a federal statute covering the same subject should be reluctant to find preemption unless it is "the clear and manifest purpose of Congress." *Id.*, 507 U.S. at 663-64, 113 S. Ct. at 1737 (quotations omitted). If the federal statute at issue contains an express preemption clause, then the analysis must focus on the plain meaning of the clause. *Id.*

In 1970, Congress passed the Federal Railroad Safety Act for the purpose of promoting "safety in every area of railroad operations and [to] reduce railroad related accidents." 49 U.S.C. § 20101 (1997).[8] This statute authorizes the Secretary of Transportation to implement regulations regarding railroad safety. *See id.* § 20103(a) (Supp. 2003). It also contains an express preemption clause:

[8] All statutory citations are to the current version of the statute, unless otherwise noted.

> Laws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety . . . when the law, regulation or order –
>
> (1) is necessary to eliminate or reduce an essentially local safety . . . hazard;
>
> (2) is not incompatible with a law, regulation or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

Id. § 20106 (1997 & Supp. 2003).

In 1973, Congress passed the Highway Safety Act, which created the Federal Highway Crossings Program and made funds available to states for the "construction of projects for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a) (2002). To participate in the program, states were required to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." *Id.* § 130(d). The projects had to include, at a minimum, signs for all railway crossings. *Id.* The Secretary of Transportation, through the Federal Highway Administration, promulgated various regulations implementing the crossings program. The rules

found at 23 C.F.R. § 646.214(b) (1999) specifically address the design of grade crossing improvements, and subsections (3) and (4) of that provision address the adequacy of warning devices installed under the crossings program.

In *Easterwood*, the United States Supreme Court held that, when sections 646.214(b)(3) and (4) apply, federal law preempts state tort law. *See Easterwood*, 507 U.S. at 670-71, 113 S. Ct. at 1741. The Court reasoned that these regulations displace state and private decision-making authority by specifying the devices to be installed and the means by which railroads are to participate in their selection. *Id.*

In *Shanklin*, the Court held that the applicability of these regulations to any given railroad crossing does not depend on "an individualized determination of adequacy" by a diagnostic team or federal officials; rather, the regulations apply to all crossings at which warning devices are installed using federal funds. *See Shanklin*, 529 U.S. at 357, 120 S. Ct. at 1476. The Court explained that it is the displacement of State law by the use of federal funds to install warning devices that has preemptive effect, not whether the installation of devices at a particular crossing meets the regulatory standards. *See Shanklin*, 529 U.S. at 357-58, 120 S. Ct. at 1476. Because of this standard, we imply a finding by the trial court that Union Pacific failed to prove federal funds were expended to install warning devices at the Front Street Crossing under the 1977 Program. *See id.*; *Pharo*, 922 S.W.2d at 948.

Union Pacific asserts there is legally and factually insufficient evidence to support this finding. The evidence before the trial court relevant to this issue

consists of testimony from Wayne Heathington, Douglas Woods, and Darin Kosmak.

The trial court admitted in evidence (before the court only) an affidavit of Darin Kosmak, the Railroad Liaison Manager in the Traffic Operations Division of the Texas Department of Transportation (the "Department"). In this affidavit, Kosmak testifies as follows:

> [Kosmak] . . . by virtue of [his] position at the [Department] [is] personally familiar with the matters stated [in his affidavit]. . . .
>
> In 1977 the [Department] implemented a program to improve all unsignalized public grade crossings in Texas. Between 1977 and 1981 the State of Texas received Federal Highway Funding in order to implement this program.
>
> Pursuant to Section 203 of the Federal-Aid Highway Act of 1976, all crossbuck protected crossings on the Missouri Pacific Railroad Company's road crossing received the benefit of Federal Funds between approximately 1977 and 1981. These funds were expensed to either install or upgrade crossing protection at all crossbuck-protected crossings to consisted [sic] of two (2) reflectorized crossbucks. As evidenced by the attached Exhibit Pages Nos. 1-2, The Missouri Pacific Railroad Company agreed to participate in this program. As evidenced by Exhibit Page No. 3, the letting date for the contract to install metal crossbuck poles and signs for District 17, which include[s] [the Front Street Crossing] was December 1977. The contract price, which was a 100% Federally-funded project, for District 17 was $395,069.26.

Under this program, the Secretary of Transportation determined the type of warning devices to be installed at [the Front Street Crossing]; determined [sic] the means by which The Missouri Pacific Railroad Company participated in the selection; and also allocated Federal Funds [sic] for said installation.

Darin Kosmak testified before the court as follows:

- It is Kosmak's understanding that certain documents relating to the 1977 Program that were kept by the State of Texas have been discarded, before Kosmak's employment with the Texas Department of Transportation. Kosmak assumes this occurred in the 1980s.
- Kosmak has attached to his affidavit the documents that he does have in connection with the 1977 Program.

In deposition testimony admitted before the court, Darin Kosmak testified as follows:

- Kosmak cannot not say how much money, if any, was actually spent on putting crossbucks or poles or signs or replacing crossbucks or poles or signs under the 1977 Program at the Front Street Crossing. Kosmak's affidavit does not contain any evidence specific to the Front Street Crossing regarding the expenditure of federal or state funds on that crossing under the 1977 Program. Kosmak does not know how much federal or state money, if any, was spent at the Front Street Crossing as a result of the 1977 Program.
- It was the State of Texas that made the decision to do whatever was done at the Front Street

Crossing as a result of the 1977 Program, if anything.

- Kosmak does not know whether anything actually occurred at the Front Street Crossing as a result of the 1977 Program.
- Under the 1977 Program, the State of Texas would have the work done and then the federal government would reimburse the State.

Wayne Heathington, an expert retained by the Limmers, testified before the court as follows:

- As Heathington understands it, Darin Kosmak of the Texas Department of Transportation did not confirm, based on his own personal knowledge, whether federal funds had been spent to install any type of crossbuck warning device at the Front Street Crossing before Billy Limmer's fatal collision.
- The 1977 Program was federally funded and approved by the Federal Highway Administration.
- Based on his examination of a photograph of the crossbuck signs at the Front Street Crossing, Heathington believes that the crossbuck signs either were never put in under the 1977 Program or were put in under the 1977 Program but not maintained.

Douglas Woods testified before the court as follows:

- He has seen the metal reflectorized crossbuck blades that have been used under the 1977 Program.
- The crossbuck blades shown in a picture of the Front Street Crossing appear to Woods to be the same type of blades. The crossbuck blades shown in a picture of the Front Street Crossing

look the same as ones that Woods has seen before.

- Woods is not aware of any Union Pacific program to put in metal reflectorized crossbuck blades.

A December 21, 1976 letter from the Department to Missouri Pacific Railroad Company (hereinafter "Missouri Pacific") states as follows:

> [The Department is] developing a project [the 1977 Program] in cooperation with the Federal Highway Administration utilizing Safety Funds under section 203 of the Federal-Aid Highway Act of 1976 to install passive warning devices at all public road crossings of all railway lines in the State of Texas. This project is designed to bring each crossing up to the minimum standard as specified in the Manual on Uniform Traffic Control Devices.
>
> Generally, the work performed on your right of way will be the installation or upgrading of reflectorized crossbuck and number of track signs and placement of pavement markings and stop lines on the pavement surface, part of which may be on your right of way . . . We propose to utilize all of the existing crossbuck signs and mountings as appropriate. Where new material is installed the State will salvage and dispose of the existing signs, without credit to your company.
>
> . . .
>
> By signing and returning one copy of this letter, you grant your company's permission for the State or its Agent to perform the work herein described as may be necessary to provide a min

imum passive warning system at public highway or road crossings on your rail system in Texas.

Union Pacific asserts it conclusively proved that federal funds were expended to install warning devices at the Front Street Crossing under the 1977 Program. Union Pacific bases this assertion on the following evidence: (1) Kosmak's affidavit and portions of Kosmak's deposition testimony; (2) the December 21, 1976 letter, (3) Woods's testimony before the trial court; (4) Heathington's testimony to the bench.

Kosmak was not involved in the 1977 Program, and he testified at his deposition that he does not know whether anything actually occurred at the Front Street Crossing as a result of the 1977 Program or whether any federal or state money was spent at the Front Street Crossing under the 1977 Program.[9]

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[9] Union Pacific asserts that, at his deposition, Kosmak testified to the actual expenditure of federal funds at the Front Street Crossing; however, the cited testimony is vague. When asked whether he could testify under oath specifically as to how much federal money, if any, was actually spent on the Front Street Crossing to upgrade or change the warning devices before Billy Limmer's death, Kosmak stated that "[t]here were federal funds expended, but I don't know how much specifically okay, how many dollars were expended." Based on other portions of his deposition testimony, the trial court could have determined that Kosmak did not mean that federal funds were expended on the Front Road Crossing but that federal funds were expended generally in the 1977 and/or 1989 Program and Kosmak does not know if any funds were expended on the Front Street Crossing. Even if this testimony had the meaning ascribed to it by Union Pacific, we presume the trial court credited other parts of Kosmak's deposition testimony, in which Kosmak testifies that he does not know whether anything actually occurred at the Front Street Crossing as a result of the 1977

Although the first sentence of the 1976 letter could be construed as meaning that the 1977 Program installed passive warning devices at all public road crossings in Texas, it also could reasonably be construed to mean that the 1977 Program only made sure that all public road crossings in Texas had sufficient passive warning devices. This latter interpretation is supported by the second sentence which indicates that the goal of the 1977 Program was for each crossing to conform to the minimum standard specified in the Manual on Uniform Traffic Control Devices (hereinafter the "Manual"). The letter states that, generally, reflectorized crossbucks will be installed or upgraded. The letter, however, also says that existing crossbuck signs and mountings will be used, as appropriate. The letter states that, "[w]here new material is installed the State will salvage and dispose of the existing signs," indicating that new material will not necessarily be installed at each crossing. Finally, by signing the letter, Missouri Pacific gave its "permission for the State or its Agent to perform the work herein described as may be necessary." This sentence indicates that work may not be necessary at each crossing.

Union Pacific also relies on Heathington's testimony that (1) the front of the crossbuck signs under the 1977 Program were reflectorized, like the crossbuck signs at the Front Street Crossing; (2) the 1977 Program was federally funded; and (3) federal funds were spent on the Front Street Crossing if the reflectorized crossbuck signs at that crossing were installed under the 1977 Program. This testimony

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Program or whether any federal or state money was spent at the Front Street Crossing under the 1977 Program or the 1989 Program. *See City of Keller*, 168 S.W.3d at 819.

does not address the issue at hand – whether federal funds were expended under the 1977 Program to install warning devices at the Front Street Crossing. Furthermore, Heathington also testified that, based on his examination of a photograph of the crossbuck signs at the Front Street Crossing, Heathington believes that the crossbuck signs at the Front Street Crossing either were never put in under the 1977 Program or were put in under the 1977 Program but not maintained.

Woods, Union Pacific's Manager of Industries and Public Projects and a longtime Union Pacific employee, did testify that the crossbuck signs shown in a picture of the Front Street Crossing appear to Woods to be the same type of signs as those that were used under the 1977 Program.[10] But, Woods was an interested witness. Testimony from interested witnesses may establish a fact as a matter of law only if the testimony could be readily contradicted if untrue, and is clear, direct, and positive, and there are no circumstances tending to discredit or impeach it. *See Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 386 (Tex. 1989); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005) (stating that the factfinder cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could

[10] Union Pacific also emphasizes Woods's testimony that he is not aware of any Union Pacific program to put in metal reflectorized crossbuck blades. However, at the time of the 1977 Program, Missouri Pacific owned the Front Street Crossing. Although Union Pacific subsequently acquired Missouri Pacific, if a railroad company installed reflectorized crossbucks or other passive warning devices at the Front Street Crossing before 1977, it would have been Missouri Pacific or one of its predecessors rather than Union Pacific.

have been readily controverted). Woods did not testify that any warning devices were installed at the Front Street Crossing under the 1977 Program. The record does not reflect that Woods would be in a position to have personal knowledge as to this issue. Woods simply testified the crossbuck signs at the Front Street Crossing "appear to be the same" and "look the same" as other crossbuck signs that he has seen that were installed under the 1977 Program. Woods's testimony on this point is not clear, direct, and positive.

Furthermore, there are circumstances tending to discredit or impeach Woods's testimony. On the same day that he gave the testimony relied on by Union Pacific, Woods testified in front of the trial court and the jury that, in all his time with Union Pacific and in all his time as a driver, having driven in at least eighteen states, he has never seen a railroad crossing that he considered extrahazardous. Woods also testified that he had never seen a crossing that needed to have lights and gates not to be extrahazardous. Woods stated that in all his travels, both working for Union Pacific and personally as a motorist, he has never on any occasion ever seen a public grade crossing that had only crossbuck signs that he believed required the installation of automatic lights and gates to make the crossing safe enough for an ordinarily prudent person to cross it safely. On the previous day, Woods testified that he had been involved in between four hundred and five hundred upgrades of warning systems at Union Pacific crossings. Woods also testified that automatic lights and gates at railroad crossings do not provide additional protection for motorists against having a train/motor

vehicle collision.[11] Presuming for the sake of argument that Woods's testimony regarding the 1977 Program was uncontroverted,[12] it still does not satisfy the standard required for interested-witness testimony to be conclusive, and reasonable people could differ in their conclusions based on it. *See Lofton*, 777 S.W.2d at 386-87 (holding that testimony by interested witness did not establish fact as a matter of law because of circumstances tending to impeach it); *Gevinson v. Manhattan Const. Co. of Ok.*, 449 S.W.2d 458, 467-68 (Tex. 1969) (holding testimony from interested witness did not conclusively prove reliance because there were circumstances tending to discredit or impeach that testimony).

After carefully reviewing the record under the applicable standard of review, we conclude Union Pacific did not conclusively prove that federal funds were expended to install warning devices at the Front Street Crossing under the 1977 Program.[13]

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[11] In his testimony, Woods distinguished between "additional warning" and "additional protection." Woods stated that automatic lights and gates provide additional warning to motorists and then insisted that this additional warning does not provide additional protection to motorists.

[12] The Limmers assert that there was contrary evidence based on the 1976 letter and Heathington's testimony.

[13] Union Pacific asserts that specific, individualized information is not required for it to have conclusively proven as a matter of law that federal funds were expended to install warning devices at the Front Street Crossing under the 1977 Program. Union Pacific cites several cases in support of this proposition. None of these cases involve an appeal by the railroad company from an adverse finding by the trial court, and none of these cases address the interested-witness rule. Furthermore, the evidence in these cases was significantly different from the evidence in this case. *See O'Bannon v. Union Pac. R. Co.*, 169

See Duncan v. Kansas City S. Ry. Co., 773 So.2d 670, 679-80 (La. 2000) (holding that evidence was sufficient to support trial court's finding that railroad company failed to prove federal funds were expended to install warning devices at the railroad crossing in question because, even though there was a program using federal funds to install warning devices in the parish where the crossing was located, a letter in evidence stated that existing crossbuck signs would remain in place and there was no evidence as to whether the crossing in question had existing crossbuck signs before the project). Recognizing the trial

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F.3d 1088, 1089-90 (8th Cir. 1999) (affirming summary judgment based on evidence that included specific evidence that a crossbuck sign and post were installed at crossing in question in federally funded project); *Wagoner v. CSX Transp., Inc.*, 246 F.Supp.2d 1002, 1007 (N.D. Ind. 2003) (discussing summary-judgment affidavit of railroad employee at the time of the project in question who specifically testifies that he has personal knowledge that federal funds were used to install crossbuck signs at the crossing in question); *Security First Bank v. Burlington No. & Santa Fe Ry. Co.*, 213 F.Supp.2d 1087, 1090 (D. Neb. 2002) (describing the summary-judgment evidence only in general terms, stating that the evidence shows that the crossing in question was included in a federally funded project, and stating that the evidence was similar to the evidence in the *O'Bannon* case); *Strozyk v. Norfolk S. Corp.*, No. Civ.A.01-2478, 2002 WL 1226857, at *2 (E.D. Pa. June 5, 2002) (stating that summary-judgment evidence included document with a specific description of the work to be completed at the crossing in question under a federally funded program as well as affidavit testimony that crossbuck signs were installed at that crossing using federal funds), *rev'd on other grounds*, 358 F.3d 268 (3rd Cir. 2004); *McDaniel v. Southern Pac. Transp.*, 932 F. Supp. 163, 167-68 (N.D. Tex. 1995) (stating that there was summary-judgment evidence showing that federal funds were expended under the 1977 Program at all Southern Pacific public road crossings and not mentioning any circumstances tending to discredit or impeach the railroad company's evidence).

court's role in this case as factfinder regarding the preemption issue and applying the factual-sufficiency standard of review, we conclude that the evidence is factually sufficient to support the trial court's implied finding that Union Pacific failed to prove federal funds were expended to install a warning device at the Front Street Crossing under the 1977 Program. Therefore, the trial court did not err in rejecting Union Pacific's preemption defense based on the 1977 Program. *See Shanklin*, 529 U.S. at 357, 120 S. Ct. at 1476.

B. Did the trial court err in impliedly rejecting Union Pacific's preemption defense as to the 1989 Program because adding retroreflectorized tape to the back of crossbuck signs and their supporting pole does not constitute the installation of a warning device?

The two poles that bear the crossbuck signs at the Front Street Crossing each have a band of retroreflectorized tape affixed to the pole beneath the sign, and the back sides of the crossbuck signs themselves, which contain no words or warnings, have retroreflectorized tape attached to them (we refer collectively to this tape hereinafter as the "Tape"). Union Pacific asserts it conclusively proved that federal funds were expended to install the Tape and that the Tape constitutes a warning device. In the alternative, Union Pacific asserts there is factually insufficient evidence to support the trial court's implied findings to the contrary. The Limmers assert that legally and factually sufficient evidence supports these implied findings. The Limmers also assert that sufficient evidence supports the trial court's implied finding that the Tape was not installed dur-

ing the 1989 Program. However, for the purposes of this analysis, we presume without deciding that the Tape was installed at the Front Street Crossing under the 1989 Program and that federal funds were expended on this installation.[14]

As part of its burden of proving its preemption defense, Union Pacific had to show that the Tape is a warning device. *See* 23 C.F.R. § 646.214(b); *Shanklin*, 529 U.S. at 352-53, 120 S. Ct. at 1473-74; *Easterwood*, 507 U.S. at 672, 113 S. Ct. at 1741. The United States Supreme Court has stated that, in making this determination, the proper inquiry is to see if the installed item meets the definition of warning device by being either an active warning device or a passive warning device as defined below:

> Active Warning Devices means those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train.
>
> Passive Warning Devices means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train.

23 C.F.R. § 646.204; *see Easterwood*, 507 U.S. at 672-73 & n.11, 113 S. Ct. at 1741-42 & n.11 (stating that installed item must meet the definition of warning device by being either an active warning device or

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[14] Kosmak testified that it cost $10 to purchase retroreflectorized tape for a railroad crossing like the Front Street Crossing.

a passive warning device as defined in 23 C.F.R. § 646.204 and holding that motion-detection circuitry intended to be used with automatic gate at railroad crossing did not meet this definition of warning device). No party contends that the Tape is an active warning device under the above definition, and there is no evidence showing that it is. Therefore, under United States Supreme Court precedent, the issue in this case is not whether the Tape is a "warning device" under the ordinary meaning of that word; rather, the issue is whether the Tape constitutes a passive warning device as defined above. *See Easterwood*, 507 U.S. at 672-73 & n.11, 113 S. Ct. at 1741-42 & n.11; 23 C.F.R. § 646.204.

To qualify as a passive warning device, the Tape must be a "traffic control device[] . . . located at or in advance of [the Front Street Crossing] to indicate the presence of a crossing." *See* 23 C.F.R. § 646.204. The definition of warning device is a matter of law that has been established under precedent from the United States Supreme Court. One might therefore conclude we should determine, as a matter of law, whether *any* retroreflectorized tape could be a warning device under this definition or whether retroreflectorized tape installed in the 1989 Program can be such a warning device. Based on the legal definition that we must apply and based on the information that we have in the record before us regarding the Tape and the 1989 Program, we conclude that we are not in a position to determine these broader issues. Therefore, we limit our analysis to the particular tape affixed to the crossbuck signs and supporting poles at the Front Street Crossing.[15] Under

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[15] This approach is consistent with the approach taken by United States District Judge Sim Lake in addressing whether

the applicable legal standard, this Tape must (1) be a traffic control device, and (2) indicate the presence of a railroad crossing. *See Easterwood*, 507 U.S. at 672-73 & n.11, 113 S. Ct. at 1741-42 & n.11. The trial court heard the following evidence regarding these issues from the Limmers' expert, Wayne Heathington:

- Heathington is familiar with the 1989 Program to add retroreflectorized tape to crossbuck signs to increase visibility at night.[16]
- The United States Department of Transportation publishes the Manual. Nowhere in the Manual does it list or classify or describe retroreflectorized tape as a traffic control device.
- The Manual states that it presents traffic control device standards for all streets and highways open to public travel regardless of the type or class or the governmental agency having jurisdiction.
- Nowhere in the Manual does it define retroreflectorized tape as a traffic control device.
- A traffic control device has to provide information or tell the motorist something to do. The Tape reflects light so something becomes more

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retroreflectorized tape allegedly installed under the 1989 Program constituted a warning device for purposes of the railroad company's preemption defense. *See Lesly v. Union Pac. R. Co.*, No. H-03-0772, U.S. Dist. LEXIS 23018, at *11-12 (S.D. Tex. June 25, 2004).

[16] The 1989 Texas statute implementing the 1989 Program and the letter in evidence from the United States Department of Transportation regarding this program both use the term "retroreflectorized." On the other hand, in some of the testimony, witnesses and lawyers use the words "reflectorized" or "retroreflective" instead. For the sake of consistency, we use "retroreflectorized" throughout this opinion.

visible and more easily seen, but the Tape has nothing to do with telling motorists to stop, to look, to observe, to turn right or to not turn right or anything of that nature. The Tape does not serve the function of a traffic control device.

- Heathington contacted the Federal Highway Administration and asked who was in charge of the Manual committee and he was told the person was Shelley Row. He then sent a letter to Ms. Row asking if the use of retroreflectorized tape on traffic sign posts and on the back of crossbuck signs is considered a traffic control device. Ms. Row responded by writing a letter as Director of the Office of Transportation Operations for the Federal Highway Administration. In this letter, Ms. Row stated that retroreflectorized tape is not considered a traffic control device.
- In enacting House Bill 2681 in 1989 (a copy of which is contained in Plaintiffs' Exhibit 110), the Texas Legislature defined an active warning device or crossbucks differently than retroreflectorized tape. The Texas Legislature made a distinction between retroreflectorized material and an active warning device or a crossbuck.[17]
- Heathington's opinion that retroreflectorized tape cannot be considered a traffic control device is supported by House Bill 2681, which states that the State Department of Highways

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[17] *See* Act of May 17, 1989, 71st Leg., R.S., ch. 269, § 1, 1989 Tex. Gen. Laws 1212, 1213 (formerly codified at TEX. REV. CIV. STAT. ANN. art. 6370b), *repealed by* Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 24(a), 1995 Tex. Gen. Laws 1025, 1870.

and Public Transportation "shall develop guidelines and specifications for the installation and maintenance of retroreflectorized material at all public grade crossings not protected by active warning devices."

- H.B. 2681 defines retroreflectorized tape separately from "warning device." Retroreflectorized tape is not considered to be a warning device. H.B. 2681 defines "Retroreflectorized material" as "material that reflects light so that the paths of the reflected light rays are parallel to those of the incident rays." H.B. 2681 defines "Active warning device" as "a bell, flashing light, gate, wigwag, or other automatically activated warning device." H.B. 2681 defines "Warning device" as "an active warning device, crossbuck, or other a traffic control sign, the purpose of which is to alert motorists of a grade crossing."
- Heathington's opinion is also supported by article 6370b of the Texas Revised Civil Statutes, which was admitted before the trial court and which codifies H.B. 2861.

Union Pacific has not cited any evidence that it introduced as to this issue, and we have found none.

1. *Is the evidence sufficient to support the trial court's implied finding that Union Pacific failed to prove that the Tape is a traffic control device?*

Under the applicable legal standard, to be a warning device, the Tape must be a traffic control device. *See id.* The regulations at issue do not define what a traffic control device is; however, they require that all traffic control devices comply with the latest edition of the Manual. The Manual states that the purpose of "traffic control devices" is "to help insure

highway safety by providing for the orderly and predictable movement of all traffic . . . throughout the national highway transportation system, and to provide such guidance and warnings as are needed to insure the safe and informed operation of individual elements of the traffic stream."

The evidence from Heathington, which we presume the trial court credited, showed that the Tape is designed to make the crossbuck signs more easily visible to motorists at night and that it is not designed to control traffic. We have found no published cases dealing with the issue of whether the addition of retroreflectorized tape constitutes the installation of a warning device.[18] Furthermore, we note the conceptual difficulty of analyzing the function of the installed item – the Tape – apart from the warning device to which it was affixed – the crossbuck signs.[19] While a crossbuck sign with retroreflectorized tape would be a traffic control device, the 1989 Program did not involve the installation of crossbuck signs. The testimony of Heathington and the photographs of the Tape in the record show that, although the Tape may increase the nighttime visibility of the

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[18] In *McDaniel v. Southern Pac. Transp.*, the district court mentions the 1989 Program, does not address whether retroreflectorized tape is a warning device, and, in the final analysis, bases its summary judgment on the 1977 Program. *See* 932 F. Supp. 163, 167 (N.D. Tex. 1995).

[19] Other than the unpublished *Enriquez* and *Lesly* cases cited below, our research has found only one case addressing whether an addition or enhancement to a preexisting warning device is itself the installation of a warning device. *See St. Louis Southwestern Ry. Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864, 867 (8th Cir. 1994) (stating that replacement of eight-inch lenses in existing flashing lights at railroad crossing with twelve-inch lenses did not constitute the installation of a warning device).

crossbuck signs to which it is attached, the Tape, by itself, does not provide guidance or warnings to motorists. After carefully reviewing the record under the applicable standard of review, we conclude Union Pacific did not conclusively prove that the Tape is a traffic control device. *See Enriquez v. Union Pac. R. Co.*, No. 5:03CV174, p. 23-25 (E.D. Tex. Dec. 30, 2004) (holding by Judge Folsom that Union Pacific did not prove its entitlement to summary judgment, in part, because evidence did not conclusively prove that installation of retroreflectorized tape in 1989 Program was the installation of a traffic control device or of a warning device) (not designated for publication); *Lesly v. Union Pac. R. Co.*, No. H-03-0772, U.S. Dist. LEXIS 23018, at *11-12 (June 25, 2004) (holding by Judge Lake that Union Pacific did not prove its entitlement to summary judgment, in part, because evidence did not conclusively prove that installation of retroreflectorized tape in 1989 Program was the installation of a warning device) (not designated for publication). Applying the factual-sufficiency standard of review, we conclude that the evidence is factually sufficient to support the trial court's implied finding that Union Pacific failed to prove that the Tape is a traffic control device.

2. *Is the evidence sufficient to support the trial court's implied finding that Union Pacific failed to prove that the Tape indicates the presence of a railroad crossing?*

In holding that evidence did not show that motion-detection circuitry intended to be used with an automatic gate at a railroad crossing was a warning device, the United States Supreme Court emphasized that, to meet the applicable definition of warning device, the installed item must indicate the presence

of a railroad crossing. *See Easterwood*, 507 U.S. at 672-73 n.11, 113 S. Ct. at 1741-42 n.11. The testimony of Heathington and the photographs of the Tape in our record show that Union Pacific did not conclusively prove that the Tape, by itself, indicates the presence of a railroad crossing. Based on this evidence, reasonable people could differ in their conclusions as to whether the Tape indicates the presence of the crossbuck signs rather than indicating the presence of a railroad crossing. After carefully reviewing the record under the applicable standard of review, we conclude that Union Pacific did not conclusively prove that the Tape indicates the presence of a railroad crossing. *See Enriquez*, No. 5:03CV174, p. 23-25; *Lesly*, No. H-03-0772, U.S. Dist. LEXIS 23018, at *11-12. Applying the factual-sufficiency standard of review, we conclude that the evidence is factually sufficient to support the trial court's implied finding that Union Pacific failed to prove that the Tape indicates the presence of a railroad crossing.

Because sufficient evidence supports the trial court's implied findings that Union Pacific did not prove that the Tape is a traffic control device and that the Tape indicates the presence of a railroad crossing, we conclude the trial court did not err in rejecting Union Pacific's preemption defense based on the 1989 Program.[20] *See Shanklin*, 529 U.S. at 357, 120 S. Ct. at 1476; *Easterwood*, 507 U.S. at 672-73, 113 S. Ct. at 1741-42. Having found that Union Pacific's preemption issue lack merits as to both the

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[20] We only analyze these issues as to the tape in question at the Front Street Crossing, not as to all retroreflectorized tape. It is possible that some retroreflectorized tape might meet the definition of warning device that we apply in this case.

1977 Program and the 1989 Program, we overrule the first issue.[21]

C. Does Union Pacific's alleged negligence in failing to eliminate sight restrictions constitute an independent basis of liability?

In its second issue, Union Pacific argues that, even if federal law does not preempt the Limmers' negligence claim in Question 3, its alleged negligence in failing to eliminate sight restrictions cannot be an independent basis of liability. *See supra* note 4. The Limmers assert that Union Pacific failed to preserve error as to its second issue because it did not object to the jury question regarding apportionment of responsibility. The trial court overruled Union Pacific's objection that Question 3 is not an independent basis of liability. In an analogous situation (separate liability questions but a combined apportionment question), the Texas Supreme Court recently stated that it did not have to address whether the objecting party also had to object to the apportionment question to preserve error. *See Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 229 (Tex. 2005). In so stating, the *Romero* court quoted a federal case that stated in dicta that such an issue is a "close and difficult question." *Romero*, 166 S.W.3d at 229 n. 55 (quoting *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1124 (5th Cir. 1988)). The case cited by the *Romero* court also states in dicta that "[i]t seems likely that

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[21] Even without any deference to the statement in Shelley Row's letter that retroreflectorized tape is not considered a traffic control device, the evidence is sufficient to support the trial court's implied finding that the tape in question does not meet the applicable definition of warning device. Therefore, we need not and do not address the issue of the amount of deference, if any, that we should give to this statement.

in the case of a potentially ambiguous general verdict all the complaining party must do to protect his rights is to object to the charge and the submission *vel non* of the questionable theory or theories. . . ." *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1124 (5th Cir. 1988); *see Romero*, 166 S.W.3d at 229 n.55.

Union Pacific had to, and did, object to the trial court's submission of Question 3. *See In re A.V.*, 113 S.W.3d 355, 362-63 (Tex. 2003) (holding that party failed to preserve any error based on broad-form submission of a theory without evidentiary support where party did not object to any theory's alleged lack of evidentiary support or to the submission of a broad-form question). However, the Texas Supreme Court and this court have held that the *Casteel* harm analysis applies to charge error even if the parties did not object to the form of the jury charge. *See Harris County v. Smith*, 96 S.W.3d 230, 232, 236 (Tex. 2002) (stating that "[a] timely objection, plainly informing the court that a specific element of damages should not be included in a broad-form question because there is no evidence to support its submission, therefore preserves the error for appellate review" and holding that *Casteel* harm analysis applied to error in jury question 4, even though court stated that error was preserved as to this question only by objecting that there was no evidence to support the submission of one of its damage elements); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 387-88 (Tex. 2000) (holding that submitting invalid theories of liability in a single broad-form jury question is harmful error when it cannot be determined whether the jury based its verdict on one or more of the invalid theories and holding that party preserved error by

obtaining ruling on its timely objection asserting the invalidity of the invalid theories); *Wal-Mart Stores, Inc. v. Redding*, 56 S.W.3d 141, 150, 156-57 (Tex. App.–Houston [14th Dist.] 2001, pet. denied) (holding that party preserved error and was entitled to *Casteel* harm analysis where party objected that there was no evidence to support the submission of one of several damage elements in a question, despite party's failure object to the broad-form nature of the jury question); *see also Redding*, 56 S.W.3d at 156-57 (Wittig, J., dissenting) (noting that objecting party did not object to form of charge or argue broad form was not feasible).

In *Romero*, the trial court properly submitted one liability theory to the jury, erroneously submitted another liability theory to the jury in a separate question, and the jury answered both liability questions in the affirmative. *See Romero*, 166 S.W.3d at 225-29. In *Romero*, the court's charge used a single question regarding apportionment of responsibility. *See id.* The *Romero* court held that a *Casteel* harm analysis applied in assessing whether the submission of the erroneous theory was reversible error, although it did not address whether the complaining party was required to object to the apportionment question. *See id.* Based on the authorities cited above, we conclude that Union Pacific did not have to object to the apportionment question to be entitled to a *Casteel* harm analysis, if we determine that Union Pacific's alleged negligence in failing to eliminate sight restrictions cannot be an independent basis of liability. *See Smith*, 96 S.W.3d at 232-36; *Casteel*, 22 S.W.3d at 387-88; *Redding*, 56 S.W.3d at 156-57.

To resolve the merits of Union Pacific's second issue, a review of a line of Texas Supreme Court

cases from the late nineteenth century is essential. First, the Texas Supreme Court held several times that the failure of a railroad company to eliminate sight restrictions along its right-of-way does not necessarily constitute negligence, but that such a failure may serve as an independent basis of liability, if the fact finder determines it to be negligence after considering all the facts and circumstances. *See Galveston, H. & S.A. Ry. Co. v. Michalke*, 38 S.W. 31 (Tex. 1896) (upholding ruling by court of civil appeals that trial court did not err in instructing the jury regarding sight restrictions and stating whether railroad company's permitting of sight restrictions constituted negligence was question for fact finder), *denying writ of error as to Galveston, H. & S.A. Ry. Co. v. Michalke*, 37 S.W. 480 (Tex. Civ. App. 1896) (finding no error in trial court's instruction to jury that "[i]f you believe from the evidence that defendant permitted restrictions to be placed and remain upon its track and right-of-way, so as to obstruct the view of plaintiff in approaching the public crossing in the town of Weimar, and if you believe such acts, if any, constituted negligence on the part of defendant, and that they were the proximate cause of plaintiff's injuries, and that plaintiff did not by his negligence contribute to his injuries, then you will find your verdict for the plaintiff"); *Receivers of Houston & T.C. Ry. Co. v. Stewart*, 17 S.W. 33 (Tex. 1891) (holding that there was sufficient evidence to support the trial court's fact finding that railroad company committed negligence by placing boxcars on its side track that obstructed the view of the main track and that such a finding supports a negligence claim because whether railroad company negligently used its side track was a question of fact); *Dillingham v. Parker*, 16 S.W.

335, 335-36 (Tex. 1891) (holding trial court erred in instructing jury that a railroad company would necessarily be negligent if it allowed cars on its side track to obstruct the view of the main track near a crossing, because whether such action by the railroad company constitutes negligence under the facts and circumstances of the case is a question for the fact finder); *Eames v. T. & N.O. Ry. Co.*, 63 Tex. 660, 663-65 (Tex. 1885) (holding plaintiff alleged facts that a jury could find to constitute negligence, in case where plaintiff alleged railroad company negligently allowed bushes to grow on its right-of-way to the extent that they could conceal cattle, despite the railroad company's alleged knowledge of the presence of free-roaming cattle near the track that might be obscured from the train operator's sight by the bushes).[22]

The Texas Supreme Court again visited this topic in the *Rogers* case, in which it held the trial court erred in instructing the jury that any failure of the railroad company to eliminate sight restrictions would necessarily constitute negligence. *See Missouri, K. & T. Ry. Co. of Texas v. Rogers*, 40 S.W. 956, 957-58 (Tex. 1897). The *Rogers* court stated the trial court erroneously charged the jury that the railroad company's failure to eliminate sight restrictions alone would necessarily constitute negligence, regardless of the care with which the railroad company operated its train. *Rogers*, 40 S.W. at 957. Although the *Rogers* court recognized its *Michalke* line of cases, it also cited *Cordell*, a New York decision holding that the existence of sight restrictions along a railroad company's right-of-way cannot be an independent basis of liability, although it may be a circumstance material

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[22] For ease of reference, this line of cases is referred to as the "*Michalke* line of cases."

to the issues of the plaintiff's alleged contributory negligence and the railroad company's alleged negligence in operating the train. *See id.* at 958 (citing and quoting *Cordell v. N.Y. Cent. & Hudson River Ry. Co.*, 70 N.Y. 119 (N.Y. 1877)). Though the *Cordell* case is contrary to the *Michalke* line of cases, the *Rogers* court quoted from *Cordell*'s holding and stated that the quotation properly states Texas law, subject to a qualification relating to contributory negligence that is not relevant to the issues in the case before us. *See id.* at 958. The *Rogers* court stated that the existence of sight restrictions would not give rise to a negligence claim if the train operator exercised such care in the operation of its train as a prudent person under similar circumstances, having due regard for the safety of those traveling on the highway over the railroad, would have exercised. *See id.* at 958.

While, on the whole, the *Rogers* court seems to conclude that sight restrictions are not an independent basis of liability, there is some language in the opinion that might cloud the issue. *See id.* at 957-58. After stating that a railroad company's failure to eliminate sight restrictions does not necessarily constitute negligence, the *Rogers* court notes that it is a question of fact for the jury whether, under the circumstances, the restriction constitutes negligence and whether, under the conditions existing at the time, the railroad company exercised due care in the operation of its train. *See id.* While this statement may indicate that sight restrictions are to be considered in determining the train operator's negligence, if any, in operating the train, the statement may indi-

cate to some that sight restrictions can constitute an independent basis of liability.[23]

One year later in the *Knight* case, the Texas Supreme Court dispelled any confusion as to the meaning of its opinion in *Rogers*. *See Int'l & G.N. Ry. Co. v. Knight*, 45 S.W. 556, 557-58 (Tex. 1898). In *Knight*, the trial court, in its general-verdict instructions, instructed the jury it could find the railroad company liable based solely on its determination that the company's failure to eliminate sight restrictions (1) was an act that an ordinary prudent person would not have committed under like circumstances; (2) was negligence; and (3) was the proximate cause of the decedent's death, without any contributory negligence by the decedent. *Knight*, 45 S.W. at 557. Noting that *Rogers* had held that sight restrictions cannot constitute negligence but are merely a matter to be considered by the fact finder as to whether the operator of the train was negligent, the court stated that the railroad company's failure to eliminate sight restrictions in *Knight* could not be deemed to be negligence either in law or in fact. *Id.* The *Knight* court held that, while the evidence was sufficient to support a jury finding that the railroad company's negligence in operating its train proximately caused the decedent's death without any contributory negligence of the decedent, a new trial was required because the jury may have found the company liable based solely on its failure to eliminate sight restrictions under the trial court's erroneous jury instructions. *Id.* at 556-57. Further, the court

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[23] The *Rogers* court also cites the *Dillingham* case for the proposition that it is a fact question for the jury whether sight restrictions constitute negligence by the railroad company. 40 S.W. at 957-58.

stated that, under its *Rogers* precedent, the presence of sight restrictions was material only to the extent it might affect the determination of the company's negligence in operating its train at the crossing. *Id.* at 557-58. Thus, although the *Michalke* line of cases indicated that failure to eliminate sight restrictions could constitute an independent basis of liability, in *Knight*, the court held that sight restrictions could not constitute an independent basis of liability, relying upon *Rogers*. *Knight*, 45 S.W. at 557-58; *Rogers*, 40 S.W. at 957-58.

The Texas Supreme Court has not revisited this issue in the 107 years since it decided *Knight*; however, lower courts applying *Knight* have held that plaintiffs should take nothing if their only viable basis for negligence liability against a railroad company is an alleged failure to eliminate sight restrictions, because such a failure is not an independent basis of liability. *See Atchison, Topeka & Santa Fe Ry. Co. v. Rubrecht*, 445 S.W.2d 784, 789 (Tex. Civ. App.–Fort Worth 1969, writ ref'd n.r.e.) (reversing and rendering a take-nothing judgment because, as a matter of law, speed of train could not have proximately caused plaintiff's injuries and because failure of railroad company to eliminate sight restrictions, though found by the jury to be negligent, cannot constitute an independent basis of liability under *Rogers* and *Knight*); *Wichita Falls & S. R.R. Co. v. Anderson*, 144 S.W.2d 441, 443-45 (Tex. Civ. App.–Eastland 1940, writ dism'd judgm't cor.) (holding plaintiff could not recover as a matter of law because, among other things, the failure to eliminate sight restrictions is not a ground of actionable negligence under *Rogers* and *Knight*); *Texas & P. Ry. Co. v. Boyle*, 29 S.W.2d 927, 930 (Tex. Civ. App.–El Paso 1930, writ dism'd)

(reversing and rendering take-nothing judgment because the only ground of alleged negligence submitted to jury was failure to eliminate sight restriction, which is not itself negligence under *Rogers* and *Knight*); *Texas & N.O. Ry. Co. v. Adams*, 27 S.W.2d 331, 335 (Tex. Civ. App.–Beaumont 1930, writ dism'd) (reversing and rendering a take-nothing judgment because plaintiff's other alleged grounds of negligence failed as a matter of law and because failure to eliminate sight restrictions is not an independent basis of liability under *Rogers* and *Knight*); *Galveston, H. & S.A. Ry. Co. v. McCrorey*, 23 S.W.2d 691, 692-95 (Tex. Comm'n App. 1930, judgm't adopted) (reversing and rendering take nothing judgment against plaintiff because jury found no negligence in the operation of the train but only in the railroad company's failure to eliminate sight restrictions, which the court concludes is not an independent basis of liability under *Rogers* and *Knight*).

These courts are correct that under *Rogers* and *Knight*, the Texas Supreme Court has declared that the failure to eliminate sight restrictions is not an independent basis of liability. As an intermediate court of appeals, this court is bound to follow established precedent from the Texas Supreme Court. Consideration of any changes to common-law rules must be left to that higher authority. *Lubbock County, Tex. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002); *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 195 (Tex. App.–Houston [14th Dist.] 2002, no. pet.).[24]

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[24] Even though some states have determined that the failure to eliminate sight restrictions can be an independent basis of liability, *see, e.g.*, *Alabama Great S. Ry. Co. v. Lee*, 826 So.2d 1232, 1236 (Miss. 2002) (holding that under Mississippi prece-

The Limmers argue that *Knight* and *Rogers* do not apply to the facts before us because Union Pacific did not operate the train, it merely owned the right-of-way. In *Rogers* and *Knight*, and those cases cited thus far regarding sight restrictions, the train operator also owned the right-of-way. As a matter of logic, if, as to sight restrictions, a right-of-way owner is not subject to liability as a right-of-way owner for accidents in which it operates the train, then there is no apparent reason that an owner should be subject to liability in its capacity as owner of the same right-of-way for accidents in which another company operates the train. Presuming that the Limmers timely sued Southern Pacific – the operator of the train – and that the Limmers have claims that are not pre-empted by federal law, under *Rogers* and *Knight*, they would be free to seek a determination as to whether Southern Pacific negligently operated the train at the time of the accident made the basis of this suit, giving full consideration to the sight restrictions and other conditions at the time of the accident. The fact that different companies operate the train and own the right-of-way does not alter the rationale stated in *Rogers* and *Knight*.

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dents, railroad company may be independently liable for its negligent failure to eliminate sight restrictions caused by vegetation on its right-of-way), others hold that the failure to eliminate sight restrictions does not constitute an independent basis of liability, although the sight restrictions may be considered by the fact finder in assessing the negligence of the train operator, *see, e.g., Alabama Great S. Ry. Co. v. Johnston*, 199 So.2d 840, 843-44 (Ala. 1967); *Cowles v. New York, N.H. & H.R. Co.*, 66 A. 1020, 1023 (Conn. 1907); *Cordell*, 70 N.Y. at 119. The Texas Supreme Court has chosen the latter rule, and this court cannot change the law in this regard. *See Lubbock County, Tex.*, 80 S.W.3d at 585; *McCrorey*, 23 S.W.2d at 694-95.

Research reveals no Texas case that expressly states *Rogers* and *Knight* do not apply to such circumstances, and the Limmers have not cited any authority from any jurisdiction indicating the *Rogers* and *Knight* rule does not apply to such circumstances. Indeed, a court in Alabama – which has the same common-law rule as that stated in *Rogers* and *Knight* – applied that rule to a situation in which the right-of-way owner and train operator were different companies. *See Nat'l Ry. Passenger Corp. v. H & P, Inc.*, 949 F. Supp. 1556, 1564-65 (M.D. Ala. 1996) (applying rule of law from *Alabama Great S. Ry. Co. v. Johnston*, 199 So.2d 840, 843-44 (Ala. 1967), that there is no independent negligence claim for failure to eliminate sight restrictions along the right-of-way, to fact pattern in which right-of-way owner and train operator were different companies). In sum, this attempt to distinguish *Rogers* and *Knight* is unpersuasive.

The Limmers also attempt to distinguish *Rogers* and *Knight* by arguing they apply only to "economically useful obstructions." This argument is also unpersuasive. In its analysis, the *Rogers* court cited two vegetation cases from Illinois and the *Cordell* case, which involved a pile of stumps and roots. *See Rogers*, 40 S.W. at 958 (citing *Dimick*, *Stables*, and *Cordell* cases); *Dimick v. Chicago & Northwestern Ry. Co.*, 80 Ill. 338 (Ill. 1875) (considering sight restrictions caused by trees and brush on the right-of-way as a circumstance affecting determination of plaintiff's contributory negligence); *Indianapolis & St. Louis R.R. Co. v. Stables*, 62 Ill. 313 (Ill. 1872) (considering sight restrictions caused by bush and shrubs in determining negligence of railroad company in operating the train); *Cordell*, 70 N.Y. at 121-

23 (holding that sight restrictions caused by large pile of stumps and roots and other material is not an independent basis of liability but only a circumstance to be considered in determining plaintiff's contributory negligence and the negligence of the train operator); *see also LaRocco v. Penn Cent. Transp. Co.*, 324 N.Y.S.2d 82, 83 (N.Y. 1971) (applying *Cordell* to sight restriction caused by physical condition of the road and track crossing). Although *Knight* involved sight restrictions relating to structures built near the tracks, it also involved sight restrictions relating to piles of cotton and railroad "ties." *See Knight*, 45 S.W. at 556. Furthermore, the Texas Commission of Appeals applied *Rogers* and *Knight* to sight restrictions caused by vegetation, and Texas courts of appeals have done likewise. *See McCrorey*, 23 S.W.2d at 692-95 (applying *Rogers* and *Knight* to sight restrictions caused by grass and weeds along the right-of-way); *Rubrecht*, 445 S.W.2d at 787-89 (applying *Rogers* and *Knight* to sight restrictions caused by trees and weeds along the right-of-way); *Anderson*, 144 S.W.2d at 442-45 (applying *Rogers* and *Knight* to sight restrictions caused by timber and underbrush along the right-of-way); *Adams*, 27 S.W.2d at 335 (applying *Rogers* and *Knight* to sight restrictions caused by a hill); *Oden v. Tex. & P. Ry. Co.*, 9 S.W.2d 367, 368-71 (Tex. Civ. App.–Texarkana 1928, no writ) (applying *Rogers* and *Knight* to sight restrictions caused by weeds and bushes along the right-of-way).

The Limmers cite three Texas cases in support of their argument that *Rogers* and *Knight* apply only to "economically useful obstructions." *See St. Louis Southwestern Ry. Co. of Tex. v. Larkin*, 34 S.W.2d 693, 702 (Tex. Civ. App.–Dallas 1930, writ dism'd); *St. Louis, S.F. & T. Ry. Co. v. Allen*, 296 S.W. 950,

953 (Tex. Civ. App.–Amarillo 1927, writ dism'd); *Missouri, K. & T. Ry. Co. of Tex. v. King*, 123 S.W. 151, 152 (Tex. Civ. App.–Dallas 1909, no writ). The *Allen* and *King* cases do not support the Limmers' argument in this regard; rather, without citing *Knight*, the *Allen* and *King* courts state in obiter dicta that certain sight restrictions constitute an independent basis of liability. *See Allen*, 296 S.W. at 951-53 (stating that trial court properly submitted special issue as to whether alleged sight restriction caused by weeds and grass was independent basis of liability, without mention of whether weeds and grass were used in railroad company's business, in case where court affirmed judgment in favor of plaintiff based on jury answers to special issues that supported several independent basis of liability, at least two of which involved the operation of the train); *King*, 123 S.W. at 152-53 (stating it was permissible for the trial court to charge the jury on defendant's alleged failure to eliminate sight restrictions caused by trees and coalhouse as an independent basis of liability, without citing *Knight*, and in an appeal in which the court reversed and remanded for a new trial based on charge error regarding "discovered peril"). These obiter dicta are incorrect under *Rogers* and *Knight*. *See Knight*, 45 S.W. at 557-58; *Rogers*, 40 S.W. at 957-58.

The only language that supports the Limmers' argument is more dicta found in the *Larkin* case. *Larkin*, 34 S.W.2d at 702 (stating "[o]bstructions placed by a railroad on its right of way that are necessary, either for the transaction of the business of the railroad or for its operation, and obstructions placed on the right of way by others, with permission of the railroad, to be used in connection with the

business of the railroad, cannot be made an independent ground of negligence . . . ."). The *Larkin* court, however, did not address the propriety of the charge regarding sight restrictions, and it affirmed a judgment for the plaintiff based on special issues supporting three different alleged grounds of negligence, two of which involved the operation of the train. *Id.* at 696-97. Therefore, the statements in *Larkin* upon which the Limmers rely were not necessary to the court's disposition of the appeal and are obiter dicta. *See Edwards v. Kaye*, 9 S.W.3d 310, 314 (Tex. App.–Houston [14th Dist.] 1999, pet. denied). In addition, the distinction made in *Larkin* as to whether the cause of the sight restriction is used in the railroad company's business is expressly rejected in the above analysis. *See McCrorey*, 23 S.W.2d at 692-95; *Rubrecht*, 445 S.W.2d at 787-89; *Anderson*, 144 S.W.2d at 442-45; *Adams*, 27 S.W.2d at 335; *Oden*, 9 S.W.2d at 368-71. Moreover, other states following the rule adopted in *Rogers* and *Knight* do not make the "economically useful obstruction" distinction. *See, e.g., LaRocco*, 324 N.Y.S.2d at 83 (applying same rule under New York law to sight restriction caused by physical condition of the road and track crossing); *Johnston*, 199 So.2d at 843-44 (applying same rule under Alabama law to sight restrictions caused by vegetation); *May v. S. Ry. Co.*, 129 S.E.2d 624, 626-28 (N.C. 1963) (applying same rule under North Carolina law to sight restrictions caused by vegetation); *Cowles*, 66 A. at 1023 (applying same rule under Connecticut law to sight restrictions caused by trees). There is no merit in the Limmers' attempt to distinguish *Rogers* and *Knight* based on a requirement that the sight restriction be caused by an "economically useful obstruction."

Because the alleged theory of negligence liability submitted in Question 3 is not an independent basis of liability under Texas law, we sustain Union Pacific's second issue. The trial court's error is reversible if it "probably prevented the appellant from properly presenting the case to the court of appeals." *See* TEX. R. APP. P. 44.1(a)(2); *Romero*, 166 S.W.3d at 227. The Texas Supreme Court has stated that this type of error is reversible unless the reviewing court is reasonably certain that the jury was not significantly influenced by the issues erroneously submitted to it. *See Romero*, 166 S.W.3d at 227-28. The *Romero* court determined that the trial court's erroneous submission of one claim that was not supported by the evidence[25] was reversible error because the jury apportioned responsibility in a single question based on its affirmative liability findings under the erroneously submitted claim and another properly submitted claim. *See id.* The *Romero* court stated that, because the jury found liability as to the improperly submitted claim, "the jury could not conceivably have ignored that finding in apportioning responsibility." *Id.* We are not reasonably certain that the jury in this case was not significantly influenced by the liability theory that was erroneously submitted to it in Question 3; therefore, we conclude that this error requires reversal of the judgment and a new trial.[26] *See id.*

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[25] The Supreme Court has held that, in conducting a *Casteel* harm analysis as to charge error, appellate courts treat charge error based on an invalid liability theory the same as charge error based on a liability theory not supported by the evidence. *See Romero*, 166 S.W.3d at 227.

[26] Because of our disposition of this case, we need not address Union Pacific's third and fourth issues or its argument that 49

Conclusion

There is legally and factually sufficient evidence to support the trial court's implied findings that Union Pacific failed to prove federal funds were expended to install warning devices at the Front Street Crossing under the 1977 Program and under the 1989 Program. Under Texas common law as announced by the Texas Supreme Court and followed by lower courts, Texas does not recognize the negligence claim submitted to the jury in Question 3 as an independent basis of liability. Because we are not reasonably certain that the jury in this case was not significantly influenced by the liability theory that was erroneously submitted in Question 3, we conclude that this error requires reversal of the judgment and a new trial. Accordingly, we sustain Union Pacific's second issue, reverse the trial court's judgment, and remand this case to the trial court for a new trial in accordance with this opinion.

/s/ Eva M. Guzman
Justice

Judgment rendered and Opinion on Rehearing filed November 29, 2005.

Panel consists of Chief Justice Hedges and Justices Frost and Guzman.

C.F.R. 213.37(b) preempts the alleged liability submitted to the jury in Question 3.

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 95-42790

PATRICIA LIMMER, BILLYE JOYCE SMITH,
AND BOBBY JEAN NOTHNAGEL

v.

MISSOURI PACIFIC RAILROAD COMPANY
D/B/A UNION PACIFIC RAILROAD COMPANY

JUDGMENT

This case was called to trial on November 12, 2001. Patricia Limmer, Billye Joyce Smith and Bobbye Jean Nothnagel, Plaintiffs and Missouri Pacific Railroad d/b/a Union Pacific Railroad Company Defendant, appeared in person and by their attorneys of record and announced ready for trial. A jury was demanded and duly impaneled and the cause proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury on written questions. The Charge of the Court, including jury questions, and the verdict of the jury are incorporated in this judgment for all purposes by reference.

As part of its verdict, the jury attributed responsibility for the damages for which recovery was sought as follows:

Billy Howard Limmer	15%
Missouri Pacific Railroad d/b/a Union Pacific Railroad Company	85%

Additionally, the jury found the following damages:

Patricia Limmer	
a. Loss of companionship and society.	2,000,000.00
b. Mental anguish.	3,000,000.00
Billye Joyce Smith	
a. Loss of companionship and society.	100,000.00
b. Mental anguish.	400,000.00
Bobbye Jean Nothnagel	
a. Loss of companionship and society.	100,000.00
b. Mental anguish.	400,000.00
TOTAL DAMAGES	6,000,000.00
(Less 15%)	900,000.00
NET COMPENSATORY DAMAGES	5,100,000.00
Pre-judgment Interest (02/17/95 to 04/01/02)	3,633,458,70
TOTAL COMPENSATORY DAMAGES WITH PREJUDGMENT INTEREST	8,733,458.70

It is therefore, ORDERED, ADJUDGED AND DECREED by this Court that the Plaintiffs recover from the Defendant Missouri Pacific Railroad d/b/a Union Pacific Railroad Company the total sum of $8,733,458.70 as actual damages including pre-judgment interest, and post judgment interest at the rate of ten percent (10%) compounded annually from the date of this Judgment until paid, and all taxable costs of court.

SIGNED this 1st day of April, 2002.

/s/ CAROLINE BAKER
JUDGE CAROLINE BAKER
JUDGE PRESIDING

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 95-42790

PATRICIA LIMMER, BILLYE JOYCE SMITH,
AND BOBBY JEAN NOTHNAGEL

v.

MISSOURI PACIFIC RAILROAD COMPANY
D/B/A UNION PACIFIC RAILROAD COMPANY

ORDER

The Court has considered the Defendant's Motion for Judgment N.O.V. The motion is denied.

SIGNED this 9th day of July, 2002.

/s/ CAROLINE BAKER
JUDGE PRESIDING

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 95-42790

PATRICIA LIMMER, BILLYE JOYCE SMITH,
AND BOBBY JEAN NOTHNAGEL

v.

MISSOURI PACIFIC RAILROAD COMPANY
D/B/A UNION PACIFIC RAILROAD COMPANY

[Filed Feb. 13, 2002]

CHARGE OF THE COURT

MEMBERS OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.
3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.
5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answer, that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.
6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less

than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No."

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by witnesses who saw the act done or heard the words spoken or by documentary evidence. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

INSTRUCTIONS

"Negligence" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

There may be more than one proximate cause of an event, but if an act or omission of any person not a party to the suit was the "sole proximate cause" of an occurrence, then no act or omission of any other person could have been a proximate cause.

QUESTION NO. 1

Was the Front Street Crossing an extra-hazardous crossing on the occasion in question?

A railroad grade crossing is "extra-hazardous" when, because of surrounding conditions, it is so dangerous that person using ordinary care cannot pass over it in safety without some warning other than the usual cross buck sign.

Answer "Yes" or "No."

ANSWER: Yes

If in answer to Question No. 1 you have answered "Yes," then answer the following Question. Otherwise, do not answer the following Question.

QUESTION NO. 2

Was the negligence, if any, of the Missouri Pacific Railroad, through its agents or employees, a proximate cause of the collision in question?

In answering this question, you may consider only the following acts of negligence, if any:

(1) failure to provide automatic signals (such as flashing lights or gates);

(2) failure to provide a flag man at the Front Street crossing; and/or

(3) failure to install a stop sign

Answer "Yes" or "No"

ANSWER: Yes

QUESTION NO. 3

Was the negligence, if any, of the Missouri Pacific Railroad, through its agents or employees, a proximate cause of the collision in question?

In answering this question, you may consider only the following acts of negligence:

(1) failure to eliminate a sight restriction, if any, caused by a pile of crushed limestone at the crossing; and/or

(2) failure to eliminate a sight restriction, if any, caused by vegetation at or near the crossing.

Answer "Yes" or "No"

ANSWER: Yes

QUESTION NO. 4

Was the negligence, if any, of Billy Howard Limmer a proximate cause of the collision in question?

In your determination of this question, you shall not consider whether Billy Limmer failed to stop within 50 feet, but not less than 15 feet, from the nearest rail, which is inquired about in the following question.

Answer "Yes" or "No."

ANSWER: Yes

QUESTION NO. 4(a)

"Negligence" when used with respect to the conduct of Billy Limmer in the following question means a failure to stop within 50 feet, but not less than 15 feet, from the nearest rail:

(a) when the railroad engine approaching within approximately 1,500 feet of the highway crossing emits a signal audible from such distance and the engine by reason of its speed or nearness to such crossing is an immediate hazard; or

(b) when an approaching train is plainly visible and is in hazardous proximity to such crossing.

A failure to comply with this law is negligence in itself, unless excused. A failure to comply is excused if Billy Limmer was unable after reasonable diligence or care to comply.

Was the negligence, if any, of Billy Limmer a proximate cause of the collision in question?

Answer "Yes" or "No"

ANSWER: No

If, in answer to Questions Nos. 2 or 3 and 4 or 4(a) you have found that the negligence of more than one of those named below proximately caused the collision, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 5

What percentage of the negligence that caused the collision do you find to be attributable to each of those found by you, in your answer to Questions Nos. 2 or 3 and 4 or 4(a) to have been negligent?

The percentages you find must total 100 percent. The negligence attributable to one of those named below is not necessarily measured by the number of acts or omissions found. The percentage attributable to any one party need not be the same percentage attributed to that party in answering another question.

a.	Missouri Pacific Railroad	85%
b.	Billy Howard Limmer	15%
	T.tal	100%

If, in answer to Question No. 4 and 4(a) you have answered "No" for Billy Howard Limmer or if, in answer to Question 5 you have answered 50 percent or less for Billy Howard Limier, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 6

What sum of money, if paid now in cash, would fairly and reasonably compensate Patricia Limmer for her damages, if any, resulting from the death of Billy Howard Limmer?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of Billy Howard Limmer.

a. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Patricia Limmer, in reasonable probability, would have from Billy Howard Limmer had he lived.

ANSWER: $ Three (3) Million

b. Mental anguish.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Patricia Limmer because of the death of Billy Howard Limmer.

ANSWER: $ Two (2) Million

In determining damages for elements (a) and (b), you may consider the relationship between Patricia Limmer and Billy Howard Limmer, their living arrangements, any extended absences from one

another, the harmony of their family relations, and their common interests and activities. You are reminded that elements (a) and (b), like the other elements of damages, are separate, and, in awarding damages for one element, you shall not include damages for the other.

Answer, with respect to the elements listed above, in dollars and cents for damages, if any, that were sustained in the past and in reasonable probability will be sustained in the future.

If, in answer to Question No. 4 and 4(a), you have answered "No" for Billy Howard Limmer or if, in answer to Question No. 5 you have answered 50 percent or less for Billy Howard Limmer, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 7

What sum of money, if paid now in cash, would fairly and reasonably compensate Billye Joyce Smith for her damages, if any, resulting from the death of Billy Howard Limmer?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of Billy Howard Limmer.

a. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Billye Joyce Smith, in reasonable probability, would have received from Billy Howard Limmer had he lived.

ANSWER: $100,000.00
One hundred thousand

b. Mental anguish.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Billye Joyce Smith because of the death of Billy Howard Limmer.

ANSWER: $400,000.00
Four hundred thousand

In determining damages for elements (a) and (b), you may consider the relationship between Billye Joyce Smith and Billy Howard Limmer, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements (a) and (b), like the other elements of damages, are separate, and, in awarding damages for one element, you shall not include damages for the other.

Answer, with respect to the elements listed above, in dollars and cents for damages, if any, that were sustained in the past and in reasonable probability will be sustained in the future.

If, in answer to Question No. 4 and 4(a), you have answered "No" for Billy Howard Limmer or if, in answer to Question No. 5 you have answered 50 percent or less for Billy Howard Limmer, then answer the following questions. Otherwise, do not answer the following question.

QUESTION NO. 8

What sum of money, if paid now in cash, would fairly and reasonably compensate Bobbye Jean Nothnagel for her damages, if any, resulting from the death of Billy Howard Limmer?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of Billy Howard Limmer.

a. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Bobbye Jean Nothnagel, in reasonable probability, would have received from Billy Howard Limmer had he lived.

ANSWER: $100,000.00
One hundred thousand

b. Mental anguish.

"Mental anguish" means the emotional pain, torment; and suffering experienced by Bobbye Jean Nothnagel because of the death of Billy Howard Limmer.

ANSWER: $400,000.00
Four hundred thousand

In determining damages for elements (a) and (b), you may consider the relationship between Bobbye Jean Nothnagel and Billy Howard Limmer, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements (a) and (b), like the other elements of damages, are separate, and, in awarding damages for one element, you shall not include damages for the other.

Answer, with respect to the elements listed above, in dollars and cents for damages, if any, that were sustained in the past and in reasonable probability will be sustained in the future.

If, in answer to Question Nos. 2 and/or 3, you have found that the negligence of Missouri Pacific Railroad proximately caused the collision, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 9

Was such negligence of Missouri Pacific Railroad "gross negligence"?

"Gross negligence" means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission in question was the result of actual conscious indifference to the rights, welfare, or safety of the persons affected by it.

You are further instructed that in order for Missouri Pacific Railroad to be grossly negligent, you must find that the Missouri Pacific Railroad authorized the doing and the manner of the act or that the Missouri Pacific Railroad ratified or approved the act.

Answer "Yes" or "No."

ANSWER: Yes

If, in answer to Question Nos. 2 and/or 3, you have found that the negligence of Missouri Pacific Railroad proximately caused the collision, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 10

Was the conduct of Missouri Pacific Railroad that you have found to be negligent engaged in with malice?

Missouri Pacific Railroad's conduct was engaged in with "malice" if it was either (a) specifically intended by Missouri Pacific Railroad to cause substantial injury to Billy Howard Limmer, or (b) was an act carried out with a flagrant disregard for the rights of others and with actual awareness on the part of Missouri Pacific Railroad that the acts would, in reasonable probability, result in human death, great bodily harm, or property damage.

Answer "Yes" or "No."

ANSWER: No

If you have answered Question Nos. 2 and/or 3 "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 11

Did the conduct of Missouri Pacific Railroad that you have found to be negligent, rise to the level of intentional conduct?

Missouri Pacific Railroad's conduct was "intentional" if Missouri Pacific Railroad desired to cause the consequences of its conduct, or if Missouri Pacific Railroad believed that the consequences were substantially certain to result from it.

Answer "Yes" or "No."

ANSWER: No

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror –

1. to preside during your deliberations,
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4. to preside over the vote on the questions,
5. to write your answers to the questions in the space provided, and
6. to certify your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss this case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all of the foregoing questions which you are required to answer under the

instructions of the judge, and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

/s/ CAROLINE BAKER
JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by those rendering the verdict if not unanimous.)

1. /s/ Linda M. Ramos
2. /s/ Victor Elizondo
3. /s/ Suzette Casey
4. /s/ Kathy Sandel Thompson
5. /s/ Sandra Stuart
6. /s/ Linda Harris
7.
8. /s/ Lester L. Oliver
9. /s/ Patti J. Boone
10. /s/ Kay Kazmierski
11. /s/ Gerald [illegible]
12.

THE SUPREME COURT OF TEXAS

Orders Pronounced January 15, 2010

* * * * *

THE MOTIONS FOR REHEARING OF THE FOLLOWING CAUSES ARE DENIED:

06-0023 MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY v. PATRICIA LIMMER, BILLYE JOYCE SMITH, AND BOBBY JEAN NOTHNAGEL; from Harris County; 14th district (14-02-00688-CV, 180 SW3d 803, 11-29-05)

(Justice O'Neill and Justice Guzman not sitting)

* * * * *

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The 2006 version of the Federal Railroad Safety Act of 1970 provided in pertinent part:

49 U.S.C. § 20106 (2006)

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety or security hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

2. The current version of the Federal Railroad Safety Act of 1970 provides in pertinent part:

49 U.S.C. § 20106. Preemption

(a) National uniformity of regulation.—(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.—(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

(A) has failed to comply with the Federal standard of care established by a regulation or order

issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.—Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

3. The Highway Safety Act of 1973 provides in pertinent part:

23 U.S.C. § 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings

paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum,

such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.—

(1) In general.—Before making an apportionment under section 104(b)(5) for a fiscal year, the Secretary shall set aside, from amounts made available to carry out the highway safety improvement program under section 148 for such fiscal year, at least $220,000,000 for the elimination of hazards and the installation of protective devices at railway-highway crossings. At least ½ of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(2) Special rule.—If a State demonstrates to the satisfaction of the Secretary that the State has met all its needs for installation of protective devices at railway-highway crossings, the State may use funds made available by this section for other highway safety improvement program purposes.

(f) Apportionment.—

(1) Formula.—Fifty percent of the funds set aside to carry out this section pursuant to subsection (e)(1) shall be apportioned to the States in accordance with the formula set forth in section 104(b)(3)(A), and 50 percent of such funds shall be apportioned to the States in the ratio that total public railway-highway crossings in each State bears to the total of such crossings in all States.

(2) Minimum apportionment.—Notwithstanding paragraph (1), each State shall receive a minimum of one-half of 1 percent of the funds apportioned under paragraph (1).

(3) Federal share.—The Federal share payable on account of any project financed with funds set aside to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works and the Committee on Commerce, Science, and Transportation, of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives, not later than April 1, 2006, and every 2 years thereafter, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway crossings program.

(h) Use of funds for matching.—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

(i) Incentive payments for at-grade crossing closures.—

(1) In general.—Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade railway-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads.—A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment.—The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of—

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments.—A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety.—In carrying out projects under this section, a State shall take into account bicycle safety.

(k) Expenditure of funds.—Not more than 2 percent of funds apportioned to a State to carry out this section may be used by the State for compilation and analysis of data in support of activities carried out under subsection (g).

***(l)* National crossing inventory.**—

(1) Initial reporting of crossing information.—Not later than 1 year after the date of enactment of the Rail Safety Improvement Act of 2008 or within 6 months of a new crossing becoming operational, whichever occurs later, each State shall report to the Secretary of Transportation current information, including information about warning devices and signage, as specified by the Secretary, concerning each previously unreported public crossing located within its borders.

(2) Periodic updating of crossing information.—On a periodic basis beginning not later than 2 years after the date of enactment of the Rail Safety Improvement Act of 2008 and on or before September 30 of every year thereafter, or as otherwise specified by the Secretary, each State shall report to the Secretary current information, including information about warning devices and

signage, as specified by the Secretary, concerning each public crossing located within its borders.

(3) Rulemaking authority.— The Secretary shall prescribe the regulations necessary to implement this subsection. The Secretary may enforce each provision of the Department of Transportation's statement of the national highway-rail crossing inventory policy, procedures, and instructions for States and railroads that is in effect on the date of enactment of the Rail Safety Improvement Act of 2008, until such provision is superseded by a regulation issued under this subsection.

(4) Definitions.—In this subsection—

(A) "public crossing" means a location within a State, other than a location where one or more railroad tracks cross one or more railroad tracks either at grade or grade-separated, where—

(i) a public highway, road, or street, including associated sidewalks and pathways, crosses one or more railroad tracks either at grade or grade-separated; or

(ii) a publicly owned pathway explicitly authorized by a public authority or a railroad carrier and dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others, that is not associated with a public highway, road, or street, or a private roadway, crosses one or more railroad tracks either at grade or grade-separated; and

(B) "State" means a State of the United States, the District of Columbia, or Puerto Rico.

4. 23 C.F.R. § 646.204 provides:

§ 646.204 Definitions.

For the purposes of this subpart, the following definitions apply:

Active warning devices means those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train.

Company shall mean any railroad or utility company including any wholly owned or controlled subsidiary thereof.

Construction shall mean the actual physical construction to improve or eliminate a railroad-highway grade crossing or accomplish other railroad involved work.

A diagnostic team means a group of knowledgeable representatives of the parties of interest in a railroad-highway crossing or a group of crossings.

Main line railroad track means a track of a principal line of a railroad, including extensions through yards, upon which trains are operated by timetable or train order or both, or the use of which is governed by block signals or by centralized traffic control.

Passive warning devices means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train.

Preliminary engineering shall mean the work necessary to produce construction plans, specifications, and estimates to the degree of completeness required for undertaking construction thereunder, including locating, surveying, designing, and related work.

Railroad shall mean all rail carriers, publicly-owned, private, and common carriers, including line haul freight and passenger railroads, switching and terminal railroads and passenger carrying railroads such as rapid transit, commuter and street railroads.

Utility shall mean the lines and facilities for producing, transmitting or distributing communications, power, electricity, light, heat, gas, oil, water, steam, sewer and similar commodities.

5. 23 C.F.R. § 646.214 provides:

§ 646.214 Design.

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) *Adequate warning devices,* under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) *Grade crossing elimination.* All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[Graphic Omitted]

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
826 FEDERAL OFFICE BUILDING
AUSTIN, TEXAS 78701-3276

January 17, 1989

IN REPLY REFER TO

HEC-TX

Low-Cost Ways to Improve the Visibility
of Night Trains at Crossings

Mr. R. E. Stotzer, Jr.
State Engineer – Director
State Department of Highways
and Public Transportation
Austin, Texas 78701

Attention: Mr. Luis Ybanez

Dear Sir:

The Federal Highway Administration (FHWA) has completed a research activity directed at enhancing the safety of rural railroad grade crossings. This research involved the use of existing low-cost retroreflective devices to focus the driver's attention at a nonsignalized crossing when a train is present. Each year there are approximately 800 accidents resulting in about 60 fatalities and 400 injuries where a motorist runs into the side of a train at night. Many of these accidents occur at low-volume crossings that only have advance warning signs, crossbucks and pavement markings. Because the use of active railroad grade crossing devices such as flashing lights

and gates are not warranted at these crossings, improvements are not generally made. The devices detailed in this letter provide the opportunity to enhance safety at these railroad crossings, and therefore we wish to bring them to your attention.

A number of devices were installed at rural railroad crossings and evaluated at night with a train traveling through the crossing. These are listed in the enclosure along with a brief description of how the devices were evaluated. Based on a subjective evaluation by the contractor, the most promising devices were:

- Multiple retroreflectorized panels installed in all four quadrants of the railroad crossing.
- Retroreflective material installed on the backs of crossbucks and their support posts.

These devices were located on the far side of the crossing from approaching traffic so as to retroreflect light from the vehicle headlights through the moving gaps in the train. The resulting flickering light attracts the driver's attention to the presence of a moving train at the crossing. Both types of devices were visible at 200-300 feet in advance of the crossing through the gaps between train cars and wheels. Experience with the use of off-the-shelf retroreflective panels indicates they are both durable and relatively inexpensive.

Some States and railroad companies are installing retroreflective material on the backs of crossbucks or back-to-back crossbucks as a standard practice. We are not aware of any States or railroads installing specific retroreflective panels or retroreflective material on the backs of sign posts.

These devices are not intended to be used in lieu of upgrading when it is warranted, but rather at crossings with passive warning systems where low-volume use makes other types of safety improvements impractical. Federal-aid funds may be used to fund these low-cost improvements.

When improving the visibility of the railroad crossing, high efficiency retroreflective material should be used on the backs of crossbucks and sign supports and on both sides of panels. Panels on two-way roads should use white/silver retroreflective material, while panels on one-way roads should have yellow retroreflective material on the left side and white/silver on the right side. Whenever white is specified as a sign color, it includes silver-colored retroreflective coatings or elements that retroreflect white light.

If you decide on implementation actions related to these features, we would appreciate being kept informed. This will provide us with information to pass on to other FHWA and DHT offices.

Sincerely yours,

Greg Schertz

Greg Schertz
Safety and Traffic
Operations Coordinator

Enclosure

cc: Mr. Bob Hodge

[Graphic Omitted]

U.S. Department
of Transportation

Federal Highway
Administration

400 Seventh St., S.W.
Washington, D.C. 20590

August 2, 2000

Refer to: HOTO-1

Mr. K. W. Heathington
President
Applied Research Associates, Inc.
7653 Charlton Drive
Knoxville, TN 37920

Dear Mr. Heathington:

Thank you for your June 27 letter requesting an official ruling on the use of retroreflective tape on traffic sign posts and on the back of the Highway-Rail Grade Crossing (Crossbuck) sign (R15-1) as shown in the two photographs you enclosed.

Retroreflective tape is not considered a traffic control device and, therefore, its use around a traffic sign post does not conflict with the standards in the Manual on Uniform Traffic Control Devices.

You should be aware that the use of retroreflective tape on the back of the Highway-Rail Grade Crossing (Crossbuck) sign (R15-1) is being proposed in Section 8B.2 of the revision of the Manual. This proposed revision was Docket 96-47 in the January 6, 1997, edition of the Federal Register. For additional infor-

mation, you may wish to refer to the web site for the MUTCD at: **http://mutcd.fhwa.dot.gov**.

For record keeping purposes, we have assigned the following interpretation number to this request: II-56(I)–"Reflectorized Tape." Please refer to this request number should you have future inquiries. We appreciate the opportunity to review this information and hope the above clarification is helpful.

Sincerely yours,

/s/ SHELLEY ROW
Shelley J. Row, P.E.
Director, Office of Transportation Operations

Manual on Uniform Traffic Control Devices

for Streets and Highways

2003 EDITION

Including Revision 1 dated November 2004 and Revision 2 dated December 2007

[Cover Graphics Omitted]

U.S. Department of Transportation
Federal Highway Administration

* * * * *

[Page I-1]

Manual on Uniform Traffic Control Devices

Introduction

Standard:

Traffic control devices shall be defined as all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, or bikeway by authority of a public agency having jurisdiction.

The Manual on Uniform Traffic Control Devices (MUTCD) is incorporated by reference in 23 Code of Federal Regulations (CFR), Part 655, Subpart F and shall be recognized as the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with

23 U.S.C. 109(d) and 402(a). The policies and procedures of the Federal Highway Administration (FHWA) to obtain basic uniformity of traffic control devices shall be as described in 23 CFR 655, Subpart F.

Any traffic control device design or application provision contained in this Manual shall be considered to be in the public domain. Traffic control devices contained in this Manual shall not be protected by a patent, trademark, or copyright, except for the Interstate Shield and any other items owned by FHWA.

* * * * *

Supreme Court, U.S.
FILED
JUN 16 2010
OFFICE OF THE CLERK

No. 09-1255

In the Supreme Court of the United States

PATRICIA LIMMER, BILLYE JOYCE SMITH, AND BOBBY JEAN NOTHNAGEL,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEX.

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of Texas correctly applied this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), to hold that federally-funded improvements at a railroad crossing pre-empt a state tort law claim.

RULE 29.6 STATEMENT

Union Pacific Railroad Company is the successor to the Missouri Pacific Railroad Company. Union Pacific Railroad Company is the operating subsidiary of Union Pacific Corporation, which is the only publicly traded company owning more than 10% of Union Pacific Railroad Company's stock.

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December 26, 2002 FHWA Memorandum (Tab 1 to Reply of Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company to the Brief on the Merits of the Limmer Parties as Respondents, *Mo. Pac. R.R. Co. v. Limmer*, 299 S.W.3d 78 (Tex. 2009)) 1a

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INTRODUCTION

This Court has twice held that state common law claims related to the adequacy of warning devices at a railroad crossing are pre-empted by federal law when federal funds have participated in the installation of a warning device at a railroad crossing. *See Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 352-54 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 670-71 (1993).

The decision below is fact-bound and entirely consistent with *Shanklin* and *Easterwood*. Petitioners argue that retroreflective material installed on an existing crossbuck is not itself a "warning device," and that only that upgrade—and not the original crossbuck sign—was paid for with federal funds. But retroreflective tape affixed to a crossbuck is clearly a "marking[] ... located at or in advance of grade crossings" that is designed to warn motorists of the presence of a crossing, and hence qualifies as a warning device under the plain terms of the regulation. 23 C.F.R. § 646.204. Regardless, the application of the tape to a sign effectively "installs" a new and upgraded sign. Petitioners essentially concede that their claims would be pre-empted if the railroad had pulled the sign out of the ground, placed the retroreflective tape on it, and then stuck the sign back in the ground. Federal pre-emption should not turn on such meaningless distinctions.

There is no split of authority in the lower courts. The decisions on which petitioners rely apply settled law to very different factual settings. Nothing in those few decisions suggests that any other appellate court in the Nation (state or federal) would reach a different result on these facts.

At most, the petition points to some tension between the decision below and language in two unpublished district court decisions in Texas on the narrow, fact-bound question of whether retroreflective tape added to Texas crossbucks pursuant to the 1989 Program triggers pre-emption. But subsequent federally-funded upgrades to public passive crossings in Texas have rendered that question virtually academic. The petition should be denied.

STATEMENT OF THE CASE

Statutory and Regulatory Background

1. In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA") "to promote safety in every area of railroad operations and reduce railroad-related accidents." Pub. L. No. 91-458, § 101, 84 Stat. 971, 971 (1970), codified as amended at 49 U.S.C. § 20101. The FRSA contains an express pre-emption provision, authorizing the Secretary of Transportation to issue regulations for all areas of railroad safety and pre-empting state law covering the same subject matter as a federal regulation. 49 U.S.C. §§ 20103(a), 20106.[1]

In 1973, Congress enacted the Highway Safety Act of 1973, Pub. L. No. 93-87, § 203, 87 Stat. 250, 283, and created the Federal Railway-Highway Crossings Program for the "elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a) ("Crossings Program"). To participate in the Crossings Program, states were required to "conduct and systematically maintain a survey of all highways to identify those

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[1] 49 U.S.C. § 20106 was amended in 2007 to include section (b), which limits the scope of FRSA pre-emption in certain limited circumstances not present here. Pub. L. No. 110-53, § 1528, 121 Stat. 266, 453 (2007).

railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." *Id.* §130(d). The states and the federal government have significantly reduced grade-crossing accidents, injuries, and fatalities since the Crossings Program was created. From 1980 to 2008, the number of grade-crossing collisions fell 78 percent, injuries associated with collisions fell 76 percent, and fatalities fell 66 percent.[2]

2. The Federal Highway Administration ("FHWA") has promulgated regulations to implement the Crossings Program. As relevant here, those regulations address the adequacy of warning devices where "[f]ederal-aid funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i), (b)(4).

Under § 646.214(b)(3), an adequate warning device must include "automatic gates with flashing light signals" (*i.e.*, an "active warning device") if particular conditions are present. Petitioners do not argue that § (b)(3) is applicable here. Subsection (b)(4) provides that "[f]or crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA." *Id.* § 646.214(b)(4).

By statute, FHWA may not approve the expenditure of federal funds or authorize a project to proceed unless the project will satisfy the appropriate

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[2] *See* Ass'n of Am. Railroads, *Safety, Highway Rail Grade Crossings*, http://www.aar.org/Safety/GradeCrossingSafety/GradeCrossingSafety.aspx (last visited June 9, 2010).

safety requirements: "No funds shall be approved for expenditure ... unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing ...." 23 U.S.C. § 109(e)(1).[3]

2. At the time of Mr. Limmer's accident, the crossing in question was marked by an X-shaped crossbuck sign, which read "RAILROAD CROSSING" and was fitted with retroreflective material that had been installed pursuant to a federally-approved and funded program to upgrade railroad crossings in Texas. Pet. App. 1a, 9a & n.27.

It is undisputed that a reflectorized crossbuck sign, such as the one in place at the Front Street crossing, is a "passive warning device," defined as "those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." 23 C.F.R. § 646.204. "Traffic control device[]" is not defined in the regulations, but is defined in FHWA's *Manual on Uniform Traffic Control Devices* (the "Manual") to include "a sign, signal, marking or other device placed on or adjacent to a street or highway (by the authority of a public body or official having jurisdiction), to regulate, warn, or

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[3] The procedure through which states obtain federal funding for such programs is described in the brief of Texas, Alabama, Oklahoma, Pennsylvania, and South Carolina as *amici curiae* submitted in *Norfolk Southern Railway Co. v. Shanklin*. *See* *Amicus Curiae* Brief of Texas, Alabama, Oklahoma, Pennsylvania, and South Carolina, *Shanklin*, 529 U.S. 344 (2000) (No. 99-132), 1999 WL 1211762, at *8-10.

guide traffic." *See* Manual § 6F (1988 ed. rev. 3, Sept. 3, 1993), *available at* http://www.osha.gov/doc/highway_workzones/muted/index.html.[4]

Easterwood and Shanklin

This Court has held that §§ 646.214(b)(3) and (4) establish federal requirements for grade crossing warning devices and pre-empt any additional state tort law duties. *See Easterwood*, 507 U.S. at 670-71; *Shanklin*, 529 U.S. at 352-54.

In *Easterwood*, the Georgia Department of Transportation had decided to install gates at four railroad crossings. The gates required installation of motion-detection devices, and new circuitry for those devices, at each crossing. The Georgia DOT installed new circuitry at each crossing, and subsequently installed gates at three of the four crossings. Although a gate was also planned for the fourth crossing and federal funds were initially set aside for it, the project was not completed and the funds were reallocated for use in another project.

Adopting the longstanding agency interpretation of § 646.214 and the view of the United States, this Court concluded that the regulation "displace[s] state and private decision-making authority" and "effectively set the terms under which railroads are to participate in the improvement of crossings." *Easterwood*, 507 U.S. at 670. "In short, for projects in which federal funds participate in the installation of warning devices, the

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[4] Petitioners note the Texas Supreme Court's use of the 2003 version of the Manual, which is available at http://mutcd.fhwa.dot.gov/pdfs/2003r1r2/mutcd2003r1r2complet.pdf. Pet. 6 n.5. Where, as here, we refer to a different version, the date and an online reference have been provided.

Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection." *Id.* at 671. That federal determination pre-empts any "state law which ... seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings," including tort law. *Id.*

The *Easterwood* Court ultimately held that state tort law was not pre-empted in that particular case, because "[t]he only equipment installed" with federal funds "was the motion-detection circuitry," which without the accompanying gates "does not meet the definition of warning devices" under the regulations. *Id.* at 672. In other words, "the warning devices for which federal funds had been obtained were never actually installed at the crossing where the accident occurred." *Shanklin*, 529 U.S. at 353 (citing *Easterwood*, 507 U.S. at 671–73).

This Court's subsequent decision in *Shanklin* clarified that the touchstone for FRSA pre-emption is FHWA funding of a crossing improvement project. The facts of *Shanklin* were very similar to those at issue in this case. Mr. Shanklin was struck and killed by a train after he drove his truck onto railroad tracks. 529 U.S. at 350. The crossing was marked by reflectorized crossbucks that had been installed using federal funds. *Id.* Mr. Shanklin's widow alleged that the railroad was negligent in failing to maintain adequate warning devices at the crossing, and this Court held her state-law claim pre-empted.

The *Shanklin* Court held that pre-emption does not require proof that federal officials made any "individualized determination" concerning the adequacy of warnings at a particular crossing, and that state law is pre-empted irrespective of whether the

requirements of the federal regulation have been satisfied. *Id.* at 351, 355, 357-58. Echoing the United States's position in *Easterwood*, this Court explained that § 646.214(b) " 'establishes substantive standards for what constitutes adequate safety devices on grade crossing improvement projects financed with federal funds.' " *Id.* at 354 (quoting Br. for United States as *Amicus Curiae* Supporting Affirmance, *Easterwood*, 507 U.S. 658 (1993) (Nos. 91-790 and 91-1206), 1992 WL 12012044, at *23 ("U.S. *Easterwood* Br.")). As the United States explained, that is so because "[t]he regulation ... requires FHWA approval of the safety devices .... Thus, the warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under [the] regulation." U.S. *Easterwood* Br. at *24. If the regulation's requirements have not been satisfied, a plaintiff's remedy (if any) is federal in nature. *Shanklin*, 529 U.S. at 358-59.

Factual Context

The State of Texas implements federally-funded crossing-improvement programs through the Texas Department of Transportation, formerly known as the State Department of Highways and Public Transportation (both "TxDOT").

In 1977, TxDOT implemented a federally-funded program (the "1977 Program") that called for the installation of metal, reflectorized crossbucks at all crossings that did not require an active warning device. Pet. App. 9a.

In 1989, Texas participated in a program designed by FHWA to enhance safety at crossings by adding retroreflective devices to the *back* side of crossbuck signs and posts. FHWA relied on research showing

that 800 accidents each year, about 60 of them fatal, occurred when a motorist runs into the side of a train at night. Pet. App. 113a. FHWA determined that retroreflective devices on the back side of the signs on the far side of the crossing would reflect the driver's headlights back "'through the moving gaps in the train,'" and that "'[t]he resulting flickering light attracts the driver's attention to the presence of a moving train at the crossing.'" Pet. App. 13a. Implementing the 1989 Program, the Texas Legislature required TxDOT to develop guidelines and specifications for the installation of retroreflective material on "all public grade crossings not protected by active warning devices." Tex. Rev. Stat. Ann. art. 6370b, § 2 (Vernon Supp. 1990), codified as amended at Tex. Transp. Code § 471.004. The statute mandated that "retroreflective material shall be affixed to the backs of crossbucks and their support posts in a manner that retroreflects light from vehicle headlights to focus attention to the presence of a nonsignalized crossing." *Id.*

Texas received more than $1.3 million in federal funds to implement the 1989 Program. Pet. App. 14a. It is undisputed that the Front Street crossing at issue here was equipped with metal crossbuck warning signs mounted on steel posts, on which reflectorized material had been installed using federal funds pursuant to the 1989 Program. Pet. App. 1a, 9a & n.27.

Additional federally-funded improvements have been made to Texas crossings since the 1989 Program. In 2004, railroads in Texas implemented a federally-funded upgrade program for public passive crossings throughout the state. Under the "Highway Railroad Grade Crossing Crossbuck Sign Assembly Upgrade

Project" ("2004 Program"), existing crossbucks at most public passive crossings were removed and replaced with new crossbuck signs that comply with updated engineering standards.[5] In addition, the State of Texas, working with the railroads, identifies a number of passive crossings every year to be upgraded with lights and gates. *See* 5 RR 157-159, 169 (Nov. 14, 2001 trial transcript); 12 RR 36-37, 80, 86 (Feb. 5, 2002 trial transcript).[6] The pre emptive effect of improvements under the 1989 Program thus remains relevant only to cases involving accidents that either predate the 2004 Program or involve those relatively few crossings that were not updated under the 2004 Program or by the addition of lights and gates. Negligence claims in Texas are subject to a two-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a).

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[5] The details of the 2004 Program are explained in affidavits and exhibits filed in the summary judgment record in *Jackson v Union Pacific Railroad Company*, in the United States District Court for the Northern District of Texas, Dallas Division. *See, e.g.*, Appendix to Defendants' Motion for Partial Summary Judgment, *Jackson v. Union Pac. R.R. Co.*, No. 3:06-CV-00768-L (N.D. Tex. June 20, 2007), ECF Nos. 17-2 to -7. The 2004 Program was implemented by contracts between TxDOT, the three Class I Railroad Companies, and thirteen Short Line Railroad Companies operating in Texas. *Id.* at 183, ECF No. 17-6 at Page ID 167. Because these facts are relevant not to the legal issues presented here but instead to the jurisprudential importance of the case, the usual limitations on judicial notice do not apply. *See, e.g.*, Fed. R. Evid. 201 advisory committee's notes (describing appropriate judicial consideration of "legislative" as opposed to "adjudicative" facts); *Hart v. Sheahan*, 396 F.3d 887, 894-95 (7th Cir. 2005).

[6] "RR" refers to the court reporter's record in the Texas Supreme Court.

Procedural History

1. Petitioners sued UP for wrongful death, alleging that UP was negligent in failing to protect the crossing with an adequate warning device and in permitting gravel and vegetation to restrict visibility. Pet. App. 1a-2a. UP argued that federal law pre-empts petitioners' claims. Pet. App. 2a. The trial court denied the pre-emption defense and submitted the case to the jury. The jury found for petitioners on both counts, and the trial court entered judgment on the verdict. Pet. App. 76a-78a.

2. The court of appeals reversed, holding that petitioners' obstructed-visibility claim is not an independent basis of liability as a matter of state law and that petitioners' inadequate-warning claim is pre-empted. *See* Appendix 3 to Petition for Review of Petitioner UP, *Mo. Pac. R.R. Co. v. Limmer*, 299 S.W.3d 78 (Tex. 2009) (No. 06-0023) (*Mo. Pac. R.R. Co. v. Limmer*, No. 14-02-00688-CV, 2004 Tex. App. LEXIS 8854 (Tex. App. Oct. 5, 2004)).

More than one year later, the court of appeals granted petitioners' motion for rehearing and reversed its pre-emption ruling, holding that UP had not "conclusively prove[d] that federal funds were expended to install warning devices at the Front Street crossing under the 1977 Program," Pet. App. 49a, and that the federally-funded improvements made to the Front Street crossing pursuant to the 1989 Program did not trigger pre-emption because the retroreflective material installed was not, standing alone, a "warning device," Pet. App. 51a-60a. The court of appeals remanded for a retrial without the improper obstructed-visibility count. Pet. App. 29a.

3. On cross petitions, the Supreme Court of Texas granted review and unanimously held that petitioners' claims are pre-empted by the 1989 Program. Pet. App. 12a, 20a. Consistent with *Easterwood* and *Shanklin*, the court concluded that the "enhancement or maintenance of an existing sign to meet FHWA requirements" using federal funds constitutes federal "approval of 'the type of warning device to be installed' within the meaning of subsection (b) of the Grade Crossing Design regulations," and therefore pre-empts any state law theory that would require additional or inconsistent warning devices. Pet. App. 19a-20a. The court further held that even if enhancement of an existing device *were not* sufficient to trigger pre-emption, "the retroreflective tape was itself a warning device, and its addition to the existing crossbucks [was] an installation" that triggers pre-emption. Pet. App. 20a.

a. The Supreme Court of Texas reached the latter conclusion after carefully considering the purposes of the 1989 Program and the definitions of "warning device" under the state and federal regulations. Pet. App. 12a. The court noted that the federal regulations refer to "traffic control devices" within the definition of "passive warning devices," but do not independently define the term. Pet. App. 14a. Instead, the regulations include a "non-exclusive list of examples," including "'signs, markings, and other devices.'" *Id.* (quoting 23 C.F.R. § 646.204). The court also noted that the term "traffic control device" is defined in the Manual to include "'all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street.'" Pet. App. 15a (quoting Manual, note 1, at I-1).

The court reasoned that the retroreflective tape installed on the existing crossbucks under the 1989 Program is a "marking used to warn traffic of railroad crossings." *Id.* It observed that the "point of the 1989 program was that the addition of retroreflective tape to crossbucks would provide traffic with an additional, different warning of railroad crossings," *id.*, by reflecting light back from the far side of the crossing. Pet. App. 13a. The court noted FHWA's research with retroreflective material installed on the back side of crossbucks and their posts, which revealed that "'[t]he resulting flickering light attracts the driver's attention to the presence of a moving train at the crossing'" from 200 to 300 feet away. *Id.* (citation omitted). The court explained: "Unlike the circuitry in *Easterwood*" that this Court held insufficient to trigger pre-emption, "the retroreflective tape at the Front Street crossing actually provided motorists warning of the crossing." Pet. App. 17a.

b. The court also considered an August 2, 2000 letter from Shelley J. Row of FHWA, elicited by petitioners' expert, K.W. Heathington. Heathington had written a brief letter to Row on June 27, 2000, enclosing two photographs of the Front Street crossing and stating only that "[i]n my opinion, the tape which is used in this fashion is not a traffic control device as defined by the [Manual]. ... I am hoping that you being from FHWA can confirm this conclusion about the use of the tape." Pet. App. 17a (citation and internal quotation marks omitted).

Heathington did not explain the purpose of his inquiry, and Row apparently understood the letter as a request for confirmation that the application of retroreflective tape would not be inconsistent with the

standards for "traffic control devices" set forth in the Manual. Row's brief response stated only that under the then-current version of the Manual (which had not yet been updated to include the retroreflective tape requirement for crossbucks),[7] " 'retroreflective tape is not considered a traffic control device and therefore its use around a traffic sign post *does not conflict with* the standard in the [Manual].' " Pet. App. 17a-18a (citation omitted) (emphasis added). Row did not consider or address whether the tape or signs would constitute a "warning device" for purposes of federal pre-emption.

Petitioners argued that the Row letter should be considered as support for their position under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The court rejected that argument. It held that Row's letter was "conclusory" and contained "no reasoning and no reference to authority of any kind," and that its reference to the standards for traffic control devices in the Manual was "opaque and unexplained." Pet. App. 18a. The court also observed that petitioners' interpretation of that letter would be in tension with a previous and more specific FHWA letter concerning the 1989 Program, which repeatedly called the tape a "device" and described its use as a warning signal. Pet. App. 18a-19a. The court concluded that it could not "ascribe any persuasive value to" Row's letter under *Skidmore*. Pet. App. 19a. The court also pointed out that petitioners did not argue that Row's letter "is entitled to deference." Pet. App. 18a.

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[7] Amendments to the Manual in 2000 specifically required that all crossbucks be upgraded by use of retroreflective tape as the State of Texas initially required under the 1989 Program. *See* Manual § 8B.02 (Dec. 2000) *available at* http://mutcd.fhwa.dot.gov/pdfs/millennium/12.18.00/8.pdf.

c. Although UP introduced substantial evidence below that the Front Street crossbuck signs themselves were installed with federal funds as part of the 1977 Program, the court did not reach the question of whether the 1977 Program independently pre-empts petitioners' claims. *See* Pet. App. 20a. The court also agreed with the court of appeals' conclusion that petitioners' obstructed-visibility claim "is simply a restatement of its [pre-empted] claim that the warning at the crossing was inadequate." Pet. App. 27a.

REASONS FOR DENYING THE WRIT

The decision below is a fact-bound application of settled and properly stated rules. There is no split of authority within the lower courts or among the state and federal courts, and the issue has virtually no prospective significance because of subsequent grade crossing improvements in Texas that would pre-empt claims like these, even under petitioners' theory. In any event, the Supreme Court of Texas clearly reached the right result on these facts. The petition should be denied.

I. THE DECISION BELOW IS A FACT-BOUND AND CORRECT APPLICATION OF *EASTERWOOD* AND *SHANKLIN*

The decision below correctly states the standard for federal pre-emption articulated by this Court in *Easterwood* and *Shanklin*. *See* Pet. App. 2a & n.4. The Texas Supreme Court's application of that well-settled law to these particular facts would not merit review even if it were flawed in some way. But the decision is also plainly correct. Petitioners' argument rests on two essential premises: (1) that an upgrade to an existing warning device cannot constitute the "installation" of a

warning device under the *Easterwood* pre-emption test; and (2) that retroreflective tape affixed to a crossbuck sign is not, by itself, a warning device. Both premises are wrong.

1. Petitioners effectively concede, as they must, that the reflectorized crossbuck signs located at the Front Street crossing at the time of the accident were "warning devices" within the meaning of the regulations, and that if "federal funds participate[d] in the installation of" those signs then these claims are pre-empted. *Easterwood*, 507 U.S. at 671. Petitioners argue that the retroreflective tape, standing alone, is not a warning device. But even if the tape affixed to the Front Street crossbucks were not a separate warning device, the *sign with tape* plainly is—and the application of the tape to a sign effectively "installs" a new and upgraded warning device that the federal government has paid for and that FHWA has therefore approved. As the Supreme Court of Texas recognized, such "enhancement ... of an existing sign to meet FHWA requirements" using federal funds constitutes "approval of 'the type of warning device to be installed' within the meaning of subsection (b) of the Grade Crossing Design regulations," and therefore pre-empts state law. Pet. App. 19a-20a.[8]

Petitioners' attempted distinction between new installations and mere "upgrades" is untenable. The regulations provide that when "Federal-aid funds

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[8] *Amici Curiae* Constitutional and Administrative Law Scholars suggest that the FRSA should be interpreted to preclude pre-emption if FHWA were to approve warning device requirements "laxer than the minimal requirement of crossbucks." Br. of *Amici Curiae* at 21. That question is not remotely presented by this case.

participate in the installation of" warning devices then "the type of warning device to be installed ... is subject to the approval of FHWA." 23 C.F.R. § 646.214(b)(3)(4). Federal pre-emption is triggered by, and co-extensive with, FHWA's right to approve the warning devices installed with federal funds. *See Easterwood*, 507 U.S. at 670-71. Petitioners' argument rests on a miserly construction of the word "installation" that would deny FHWA the authority to approve upgrades to existing warning devices. But an upgrade like the one at the Front Street crossing is effectively the "installation" of a new warning device that is different from the warning device that was there before.

Petitioners' contrary interpretation has absurd consequences. On petitioners' view, if FHWA had approved a plan to remove existing crossbucks at Front Street, upgrade them with retroreflective tape, and then stick them back in the ground, then state law would be pre-empted; but because the tape was affixed without removing and then re-planting the crossbucks there is no FHWA funding/approval authority and no pre-emption. The text of the regulation does not support such a crabbed and nonsensical interpretation. In both scenarios, FHWA funds have "participated in the installation" of the upgraded device that now stands at the Front Street crossing. And in both cases, the end result—the upgraded crossbuck—is unquestionably a "warning device" within the meaning of the regulations.

Petitioners' view is also inconsistent with FHWA's own interpretation of the regulations. In a December 2002 memorandum FHWA explained its conclusion, post-*Shanklin*, that FHWA may approve projects to improve passive crossings pursuant to 23 C.F.R.

§ 646.214(b)(4) "prior to the completion of a full diagnostic review provided such projects are certified [by the state] to be in compliance with the [Manual]." Tab 1 to Reply by Missouri Pacific Railroad Co. d/b/a Union Pacific Railroad Co. to the Br. on the Merits of the Limmer Parties as Respondents at 1, *Mo. Pac. R.R. Co. v. Limmer*, 289 S.W.3d 78 (Tex. 2009), attached hereto at Opp. App. 1a. The memorandum makes clear that FHWA believes that upgrade projects to passive crossings "fall under 646.214(b)(4)" no less than initial installations, and therefore are subject to FHWA approval. Opp. App. 4a.

> The Federal railway-highway grade crossing program is not static. ... [W]hen a passive device is installed, the State must continue to assess and improve crossings in accordance with 23 USC §130 and 23 CFR Parts 646.214 and 924. This may result in a crossing being *upgraded* with an active device *or other treatment*. Furthermore, changes in the [Manual] may lead to *changes in previously erected passive devices*. When this occurs, that is when a crossing is recommended for improvement and is actually improved with Federal funds, *then the new crossing device will be the device that is treated as being in compliance with Part 646*.

Opp. App. 2a (emphases added). Of course FHWA's approval authority is coextensive with pre-emption. *See Easterwood*, 507 U.S. at 670-71; *Shanklin*, 529 U.S. at 357.

Petitioners claim that *Easterwood* supports their position that the addition of a mere "component" of a larger warning device cannot trigger pre-emption

unless the component in isolation would also be a warning device, because this Court held that the motion detection circuitry installed in that case was insufficient to trigger pre-emption. But the motion detection circuitry in *Easterwood* was merely a mechanical prerequisite for automatic gate arms that were never installed. 507 U.S. at 671-72. Without the gate arms, the new warning device that FHWA approved (and that would have triggered pre-emption) was never completed. Of course the addition of a component does not constitute the installation of a new warning device, if other essential elements of the approved new warning device remain missing. But nothing in *Easterwood* suggests, as petitioners would have it, that a new warning device can never be "installed" through the addition of new components to an existing device. The retroreflective material installed at the Front Street crossing was the entire FHWA-approved upgrade, and fully completed (or "installed") the new device that FHWA approved.

2. In any event, the retroreflective material installed pursuant to the 1989 Program is itself a "warning device" within the meaning of the federal regulations. The material is clearly a "marking[] ... located at or in advance of grade crossings" that is designed to warn motorists of the presence of a crossing. 23 C.F.R. § 646.204. As the Supreme Court of Texas explained, that was the entire purpose of the 1989 Program. The implementing statute provided that "retroreflectorized material shall be affixed to the backs of crossbucks and their support posts in a manner that retroreflects light from vehicle headlights *to focus attention to the presence of a nonsignalized crossing.*" Tex. Rev. Stat. Ann. art. 6370b, § 2 (Vernon

Supp. 1990) (emphasis added). Petitioners' suggestions that "[w]ithout a crossbuck, the tape does not indicate the presence of anything" and that "the tape itself does not 'regulate, warn, or guide traffic'" are nonsensical. Pet. 22-23. Of course if the sign were not present then the tape would be lying by the side of the road. But the retroreflective material *as affixed to existing crossbucks* pursuant to the 1989 Program does provide a warning. And surely the fact that the material was installed on a device already present at the crossing does not mean that it cannot be a warning device. A flashing light, for example, plainly would still be a warning device even if it were attached to a pre-existing crossbuck.

Petitioners' argument also consistently ignores the critical fact that this retroreflective material was "'affixed to the *backs* of crossbucks and their support posts.'" Pet. App. 13a (citation omitted) (emphasis added). The point of the 1989 Program was not to improve or upgrade the warning already delivered by the crossbucks facing the motorist; it was to provide approaching motorists with an entirely *new* warning, from the far side of the tracks, that would reflect light and "'flicker[]'" upon the presence of a moving train. *Id.* (citation omitted).

3. Petitioners erroneously assert that the court below "disregarded the FHWA's conclusion that retroreflective tape is *not* a traffic control device." Pet. 26. That "conclusion" is supposedly embodied in a brief letter (the "Row letter") written by the director of FHWA's Office of Transportation Operations in response to a cryptic inquiry from petitioners' expert, on the eve of trial in this case. Petitioners now argue that this purported agency interpretation is "entitled

to deference" under "*Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)." Pet. 27.

Petitioners have forfeited this argument. In their briefing to the Supreme Court of Texas, petitioners suggested that the Row letter should be considered under *Skidmore*, 323 U.S. at 140, an argument the court rejected. *See* Br. on the Merits of the Limmer Parties as Resps. at 22, *Mo. Pac. R.R. Co. v. Limmer*, 299 S.W.3d 78 (Tex. 2009); Pet. App. 18a-19a. Petitioners did not argue below, as they do before this Court, that the letter is entitled to *Auer* deference. And this would not be an appropriate case to consider forgiving the waiver. The Supreme Court of Texas specifically noted that petitioners had not argued for deference beyond *Skidmore*, *see* Pet. App. 17a-18a, so there is no decision below that even considers the issue. Petitioners suggest nothing about the *Auer* issue that independently merits review. And if petitioners had raised this argument for the first time in the Supreme Court of Texas, and that court had held it to be waived, this Court would now be jurisdictionally precluded from considering the issue under the adequate-and-independent-state-ground doctrine. Petitioners should not be rewarded for sandbagging the *entire* state judicial process rather than just part of it.

The Supreme Court of Texas also correctly found that the Row letter has no "persuasive value." Pet. App. 19a. Petitioners' expert's exceedingly oblique inquiry did not mention § 646.214(b) or the 1989 Program pursuant to which the upgrade had been made, nor suggest in any way that petitioners were seeking FHWA's opinion as to whether federal funds "participated in the installation of a warning device"

under the 1989 Program. Row's cursory response indicates that she understood petitioners' question to be focused on whether the use of retroreflective tape would be inconsistent with the safety standards set forth in the Manual—not whether federal funding of retroreflective upgrades triggers pre-emption. *See* Pet. App. 17a-18a. As explained above, a far more formal 2002 FHWA memo clearly indicates that the agency believes that upgrade projects *are* covered by § 646.214(b).

4. Finally, petitioners' (and *amici*'s) invocation of "the presumption against preemption" is a red herring. *See* Pet. 29-30. That presumption applies in determining the pre-emptive scope of a federal law or regulation. This Court *applied* the presumption against pre-emption when interpreting the pre-emptive scope of the regulations in *Easterwood*, and indeed rejected a more sweeping pre-emption theory offered by the railroads on the basis (in part) of that presumption. *See Easterwood*, 507 U.S. at 668.

In the limited context of crossings where § 646.214(b)(3) or (4) applies, however, this Court held that the presumption against pre-emption was overcome. Those provisions " 'cover the subject matter of adequate safety devices at crossings that have been improved with the use of federal funds,' " *Shanklin*, 529 U.S. at 354 (quoting U.S. *Easterwood* Br. at 23), and establish "a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject," *id.* at 357.

Because this Court has already interpreted the regulation, the task of the court below was to apply this Court's decisions faithfully to the evidence before it, and to determine whether the Front Street crossing

"ha[s] been improved with the use of federal funds." It was not obliged (or even permitted) to skew that analysis in a manner that would disfavor pre-emption.

II. THE DECISION BELOW DOES NOT CONFLICT WITH A DECISION OF ANY OTHER COURT

The unanimous decision of the Supreme Court of Texas does not conflict with any other authority. The decisions on which petitioners rely apply settled law to very different factual settings, and there is nothing among those few decisions to suggest that any other appellate court in the Nation (state or federal) would reach a different result on these facts. Petitioners' asserted "split" is therefore entirely illusory.

1. The Eighth Circuit's decision in *St. Louis Southwestern Railway Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994), *cert. denied*, 514 U.S. 1110 (1995), does not conflict with the decision below. The federally-funded crossing improvement project at issue in that case called for replacing existing flashing light signals with larger lenses and adding active warning devices—automatic gates—at a particular crossing. Federal funds were used to install one component of that plan—the larger lenses—but a fatal accident occurred before the automatic crossing gates could be installed.

As in *Easterwood*, only one component of the FHWA-approved plan had been implemented at the time of the accident. Straightforward application of *Easterwood* to those facts led the Eighth Circuit to conclude that the mere replacement of the lenses, without installation of the automatic gates, did not trigger pre-emption. Where the federally-funded upgrade plan called for larger lenses *and* automatic

gates, "the exchange of a single component part" (the lenses) did not amount to "installation of a warning device" for purposes of triggering pre-emption. *Id.* at 867. "Under *Easterwood*, the regulations, and the public safety policy behind the FRSA," the court held, "preemption occurs when *all* the devices prescribed in the [FHWA]-approved upgrade plan are installed and operating." *Id.* (emphasis added).

The decision below is perfectly consistent with *Malone*. In *Malone*, FHWA had implicitly determined that the larger lenses would not provide an adequate warning to motorists at that crossing without the addition of automatic gates as well. Because the warning devices FHWA considered necessary were never installed (as in *Easterwood*) there was no pre-emption. In this case, FHWA's approval of the 1989 Program reflects its determination that the existing devices, in combination, *would* be adequate if reflectorized tape were added to the backs of the existing crossbucks. Unlike *Malone* and *Easterwood*, the installation of reflectorized material was the entire federally-approved plan, and it was fully implemented.

The petition makes much of the *Malone* court's statement that "like the circuitry installed in *Easterwood*, we do not believe the exchange of a single component part of the lights in place before the upgrade was the installation of a warning device defined in 23 C.F.R. § 646.204(i)-(j)." Pet. 16. Petitioners' reliance on this dictum is misplaced. In the context of *Malone*'s actual holding and the reference to *Easterwood*, the best reading of that statement is that there was no installation of a "warning device" within the meaning of the pre-emptive regulations *because the lights were only one part of the upgrade plan.* There is

no hint in *Malone* that a federally-funded upgrade that called for increasing the size of the warning lights, and nothing more, would not have triggered pre-emption. One of petitioner's other favorite cases correctly interprets the holding of *Malone*: that "in order for preemption to apply, federal funds must be used in the installation of warning devices and the warning devices must be installed and fully operational." *Boomsma v. Dakota, Minn. & E. R.R. Corp.*, 651 N.W.2d 238, 243 (S.D. 2002), *abrogated in part on other grounds by State v. Martin*, 683 N.W.2d 399 (S.D. 2004).

Finally, even if one were to subscribe to petitioners' wooden interpretation of the *Malone* dictum it would not demonstrate a conflict between *Malone* and the decision below. The addition of reflectorized material to crossbucks that previously had no such markings is not "the exchange of a single component part" of an existing warning device.

2. Neither of the two state supreme court decisions on which petitioners rely fares any better. *Boomsma* involved three sets of tracks at a crossing. Although two of the three sets of tracks were fitted with "overhead flashing warning lights paid for with federal funds, ... those warning lights were not wired to operate" on the third set where the accident actually happened. 651 N.W.2d at 243. The court found that the third set of tracks was a distinct crossing, not just a part of a single crossing that had been upgraded pursuant to the federally-approved plan. *Id.* at 244. The railroad was able to show that federal funds *had* been used to add "rubberized mats" to the third crossing. But the court sensibly held that those mats were not warning devices. *Id.*

Duncan v. Kansas City Southern Railway Co., 773 So. 2d 670 (La. 2000), *cert. denied*, 532 U.S. 992 (2001), is even further afield. The court there affirmed the trial court's finding that the railroad had not proved that the crossing in question was actually upgraded with federal funds. *Id.* at 680. A 1980 project called for the installation or replacement of crossbucks in the state. *Id.* But with respect to the particular crossing in question, the railroad could prove only that federal funds had contributed to the addition of an "inventory number." *Id.*

Petitioners cite *Boomsma* and *Duncan* for the broad proposition that "federally funded maintenance or improvement activities do not support preemption if the item added is not itself a 'warning device.'" Pet. 17-18. But neither case involved a federally-funded "improvement" *of a warning device*. In both cases the federal funds were used only on items with no role in warning motorists. Neither case has any relevance to the issue presented here: whether a federally-funded upgrade of an existing warning device constitutes an "installation" for pre-emption purposes.

In any event, there would be no split in authority even accepting petitioners' mischaracterization of the holdings in *Boomsma* and *Duncan*. In this case, unlike those cases, the Supreme Court of Texas correctly concluded after a lengthy discussion that the reflective material installed at the Front Street crossing *was* itself a "warning device" within the meaning of the federal regulations. Pet. App. 12a-17a. Petitioners' own cases well illustrate that the petition seeks, at most, fact-bound error correction on that point.

3. Finally, petitioners point to two unpublished orders of federal district courts in Texas suggesting

that retroreflective tape, without more, may not be a "passive warning device." *See Lesly v. Union Pac. R.R. Co.*, No. H-03-0772, 2004 U.S. Dist. LEXIS 23018 (S.D. Tex. June 25, 2004); *Enriquez v. Union Pac. R.R. Co.*, No. 5:03-CV-174, 2004 U.S. Dist. LEXIS 28989 (E.D. Tex. Dec. 30, 2004). In *Lesly*, the district court denied summary judgment because the railroad had not established that federal funds were used to install retroreflective tape at the crossing in question. The court then stated *in dicta* that a trial would be necessary in any event because the plaintiffs "have provided evidence that ... such tape, in and of itself, is not a warning device" as defined in the Manual, and "the evidence presented here does not clarify whether the process of merely adding retroreflective tape to crossbucks constitutes 'installing' a 'warning device.'" 2004 U.S. Dist. LEXIS 23018, at *12. In other words, the *Lesly* court believed (perhaps erroneously) that the pre-emption issue turned on evidence and disputed issues of fact, and denied summary judgment. The opinion does not clearly resolve the legal question.

Enriquez subsequently relied on the vague dicta in *Lesly* to hold that "[i]n the same sense that a pole of a crossbuck sign is not a passive warning device, the tape, without more, is not a passive warning device." 2004 U.S. Dist. LEXIS 28989, at *45. But the decision contains little independent analysis. The Supreme Court of Texas considered both *Enriquez* and *Lesly* and properly found them unpersuasive. Pet. App. 19a n.60.

In *McDaniel v. Southern Pacific Transportation*, 932 F. Supp. 163, 167 (N.D. Tex. 1995)—the only published federal decision on point—the district court recognized, consistent with the decision below, that the

federally-funded retroreflective upgrades made pursuant to the 1989 Program trigger pre-emption. The Fifth Circuit has not weighed in on the question, and there is no reason to believe that other federal district courts in Texas would follow a poorly reasoned unpublished order rather than the published opinion in *McDaniel* or the thorough analysis of the Supreme Court of Texas. To characterize petitioners' asserted federal/state-court "split" on this issue as embryonic would be generous.[9]

III. THE REAL QUESTION PRESENTED IS EXCEEDINGLY NARROW AND UNLIKELY TO RECUR

In any event, petitioners cannot credibly claim that these decisions demonstrate disagreement among the federal and state courts in Texas as to the proper *standard* for FRSA pre-emption. At most, any nascent split within Texas involves the narrow, fact-bound question of whether retroreflective tape added to crossbucks pursuant to the 1989 Program triggers pre-emption under the established standards articulated in *Easterwood* and *Shanklin*. That question is of vanishing prospective importance.

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[9] Petitioners' comparison of this case to *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), *see* Pet. 30, is thoroughly inapt. In *Bates*, this Court granted certiorari to resolve a longstanding (spanning two decades) and deep conflict among numerous federal courts of appeals and state supreme courts on the fundamental question whether the Federal Insecticide, Fungicide, and Rodenticide Act pre-empts state tort claims relating to crop injury. This Court has already twice spoken to the pre-emptive scope of § 646.214(b) and, as explained, the only arguable "split" here rests on two unpublished district court decisions.

Under Texas law, negligence claims are subject to a two-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a). Under the 2004 Program, most existing crossbucks at public passive crossings in Texas were removed and replaced with completely new crossbuck signs that comply with updated engineering standards. The question of whether the 1989 Program triggers FRSA pre-emption therefore will soon be academic, if it is not already. Most negligence claims involving accidents that pre-date the 2004 Program would have to have been brought no later than 2006. The chance that any significant number of such cases remain in the judicial pipeline at this point is quite small. And any negligence claim arising out of an accident at a crossing updated pursuant to the 2004 Program would presumably be pre-empted by the federal regulations, even under petitioners' theory.

Petitioners note that *amici* supporting UP "attested to the importance" of this case in urging the Supreme Court of Texas to grant review. Pet. 32. The court of appeals' decision below *was* important. It had decided the pre-emption issue in a manner that conflicted with *Easterwood* and *Shanklin* and threatened to spawn confusion among the lower courts. But the Supreme Court of Texas granted review and reversed that problematic holding. What was once a potentially interesting case has now become a routine and fact-bound application of settled law, completely consistent with this Court's precedents and the decisions of other courts.[10]

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[10] Even if petitioners were to obtain a ruling from this Court that the 1989 Program does not trigger FRSA pre-emption, UP would be entitled to a remand on the question whether the 1977

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Program pre-empts petitioners' claims, an issue that the Supreme Court of Texas declined to reach.

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December 26, 2002 FHWA Memorandum (Tab 1 to Reply of Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company to the Brief on the Merits of the Limmer Parties as Respondents, *Mo. Pac. R.R. Co. v. Limmer*, 299 S.W.3d 78 (Tex. 2009)) 1a

[Logo omitted]
U.S. Department
of Transportation

Federal Highway
Administration

Memorandum

Subject: INFORMATION: Funding of Passive Improvements at Railway-Highway Crossings

Date: December 26, 2002

[Original signed by:]
From: Mary E. Peters
Administrator
(HOA-1)

Reply to: HAS-10/HCC-30

To: Directors of Field Services
Division Administrators
Federal Lands Highway
Division Engineers

This is in follow-up to Office of Safety's February 13, 2001, memorandum, "Approval of Federal Funds of Highway-Rail Grade Crossing Improvements" regarding the agency's position and necessary action following the Supreme Court's ruling relating to Norfolk Southern Railway Co. v. Shanklin. The Office of the Chief Counsel has concluded that the FHWA may fund passive improvement projects for railway-highway grade crossings, prior to the completion of a full diagnostic review provided such projects are certified to be in compliance with the Manual for Uniform Traffic Control Devices (MUTCD). This is

consistent with all statutory [23 U.S.C. §§ 109(e) and 130(d)] and regulatory requirements, and recognizes the discretion and expertise of the States in selecting warning devices in accordance with either 23 CFR §§ 646.214(b)(3) or (b)(4) when they seek Federal funds for crossing improvement projects. Passive devices installed will be treated as being in compliance with 23 CFR Part 646.

The Federal railway-highway grade crossing program is not static. In fact, the program envisions a continuing assessment of all railway-highway grade crossings and provides for improvement of crossings as appropriate. Thus, even when a passive device is installed, the State must continue to assess and improve crossings in accordance with 23 USC §130 and 23 CFR Parts 646.214 and 924. This may result in a crossing being upgraded with an active device or other treatment. Furthermore, changes in the MUTCD may lead to changes in previously erected passive devices. When this occurs, that is when a crossing is recommended for improvement and is actually improved with Federal funds, then the crossing device will be the device that is treated as being in compliance with Part 646.

This action is consistent with the decision in Norfolk Southern Railway Co. v. Shanklin, 529 U.S. 344, 146 L.Ed. 2d 374, 120 S.Ct. 1467 (2000), in which the Supreme Court disagreed with the Department's contention that installation of passive devices in the absence of a full diagnostic review was not covered by the 23 CFR §§646.214(b)(3) and (4). This is also consistent with the legislative history of the railway-highway crossings program, where Congress recognized that passive devices would continue to be

used at most of the Nation's crossings. Where a diagnostic review or other analysis is not performed, approval of passive device projects funded by the FHWA is conditioned on a certification by the States that the warning device(s) to be installed or upgraded meets the Federal standards set forth in the MUTCD, therefore, fulfilling the requirements of 23 U.S.C. § 109(e).

When Congress established the railway-highway grade crossing program by enacting 23 U.S.C. § 130(d), it recognized the distinction between crossings needing active devices, and the much larger number of crossings needing only passive devices, observing that "[f]ew of these lightly-traveled crossings, therefore, have sufficient accident potential to justify train-activated protection," and provided funding "to be devoted to providing adequate signing at all such crossings." 1973 U.S.C.A. 1859, at 1892-93. Our decision that permitting the funding of MUTCD compliant passive device projects without a diagnostic analysis is consistent with the congressional hope and expectation that "every railroad crossing in America will be equipped with adequate warning signs located at a proper distance from the crossings, and new high visibility signs at the rail-highway crossing proper." Id.

We recognize that the FHWA has frequently required a full diagnostic review as a prerequisite to a finding that a particular crossing is "adequate" for purposes of Federal funding. However, a reexamination of the law and our regulations in light of the Shanklin decision leads us to conclude that this is not the case. Our rules do set forth more extensive requirements for funding active grade crossing devices

and for determining the appropriate device to be installed as part of any highway construction. The Supreme Court determined that the funding of passive devices under these circumstances was within the more generalized reviews envisioned by 23 CFR § 646.214(b)(4). Since the majority of all crossings fall under the provisions of (b)(4), passive devices would satisfy the requirement as the appropriate type of warning device. Signing and marking projects could proceed without further review upon a statement by the State DOT that the crossings to be signed and marked fall under 646.214(b)(4).

The railway-highway program is not in the same place that it was in 1972. Rather, it is quite mature and States have a wealth of information with which to make judgments and set priorities about railway-highway grade crossings. With this information, States can decide which crossings can best be treated with passive devices, either temporarily or permanently, and which might require a more careful review leading other improvements. We believe that the current program, by prioritizing grade crossing reviews, assuring that the potentially more hazardous crossings are addressed first, and warning devices fully compliant with the MUTCD are provided at every crossing, complies with 23 U.S.C. §§109(e) and 130, and 23 C.F.R. §646.214.

If you have questions or wish additional information, please contact Mr. Rudolph M. Umbs at (202) 366-2177 or Debra Chappell at (202) 366-0087 in the Office of Safety or Mr. Raymond W. Cuprill at (202) 366-1377 in the Office of Chief Counsel.

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No. 09-1255

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FILED
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IN THE
Supreme Court of the United States

PATRICIA LIMMER, BILLYE JOYCE SMITH, AND BOBBY JEAN NOTHNAGEL,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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June 30, 2010

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Respondent's brief in opposition fails to rebut the following key points that support granting certiorari: (1) the lower courts have reached conflicting conclusions regarding the preemptive effect of improvements to railway crossings; (2) the question presented is a recurring and significant issue; and (3) the decision below disregarded the responsible federal agency's official interpretation of its own regulations. In fact, respondent highlights the appropriateness of granting certiorari by acknowledging that the decision below found that any "improvement[]" at railroad crossings preempts state law (Opp. i) – a sweeping holding that will abolish large swaths of state law and will apply far beyond the facts of this case.

ARGUMENT

I. A DIVISION OF AUTHORITY EXISTS IN THE LOWER COURTS

The standard for preemption adopted by the Texas Supreme Court conflicts with the standard applied by the Eighth Circuit and the highest courts of South Dakota and Louisiana. *See* Pet. 15-19. Respondent's efforts (at 22-27) to dismiss the conflicting decisions in the lower courts are unavailing.

Eighth Circuit. Respondent argues (at 22-24) that *St. Louis Southwestern Railway Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994), does not conflict with the decision below because, in *Malone*, the plan was to add larger lenses for flashing light signals and automatic gates, and the gates had not been completed at the time of the accident. *Malone* addressed two issues: (1) whether preemption occurred when the plan to install warning devices was approved or completed, and (2) whether the replacement of the lenses was sufficient to find preemption. The court held (1) that preemption

occurs upon completion, *see id.* at 867, and (2) that it "d[id] not believe the exchange of a single component part of the lights . . . was the installation of a warning device defined in 23 C.F.R. § 646.204(i)-(j)," *id.* This second holding was necessary to the resolution of the case, because, if the lenses themselves had been warning devices, their installation would have triggered preemption under 23 C.F.R. § 646.214(b) even if the gates had not yet been installed. Respondent offers no principled basis on which to distinguish the lenses from the tape at issue here. Thus, under the Eighth Circuit's "component of a device" approach, the decision below would have come out differently in that circuit.

South Dakota and Louisiana Supreme Courts. Respondent asserts that there is no conflict with *Boomsma v. Dakota, Minnesota & Eastern Railroad Corp.*, 651 N.W.2d 238 (S.D. 2002), and *Duncan v. Kansas City Southern Railway Co.*, 773 So. 2d 670 (La. 2000), because neither case supposedly involved "whether a federally-funded upgrade of an existing warning device constitutes an 'installation' for preemption purposes." Opp. 24-25. That is incorrect. In *Duncan*, the items in question (inventory numbers) were placed on the signs at the crossing. *See Duncan v. Kansas City Southern Ry. Co.*, 747 So. 2d 656, 667 (La. Ct. App. 1999). And, in *Boomsma*, the railroad argued that the addition of the items at issue (rubberized mats) occurred as part of an "upgrade" of the crossing. 651 N.W.2d at 243. Both courts rejected the notion, which the court below accepted in this case, that any "upgrade" of or "improvement" at a crossing constitutes the "install[ation]" of a "warning device" within the

meaning of § 646.214(b)(4). *See Duncan*, 773 So. 2d at 680; *Boomsma*, 651 N.W.2d at 244.

In any event, respondent's attempt (at 25) to draw a distinction between improvements to a crossing and improvements to a warning device at a crossing lacks support even in respondent's own articulation of the issue. Respondent frames the question presented as whether "federally-funded improvements *at a railroad crossing* pre-empt a state tort law claim." Opp. i (emphasis added). That formulation leaves no doubt that this case presents a stark choice between two lines of authority: cases such as *Malone*, *Boomsma*, and *Duncan*, which faithfully interpret the text of the regulations and this Court's cases to preempt state law only when a warning device is installed at the crossing, and the decision below, which held that any federally funded improvement at a crossing triggers preemption.

Texas Federal Courts. Respondent's attempts (at 25-27) to dismiss the federal district court decisions that squarely conflict with the decision below on the preemptive effect of Texas's 1989 program fail to dispel the lower courts' confusion on the proper standard for preemption in this context.

As to *Lesly v. Union Pacific Railroad Co.*, No. H-03-0772, 2004 U.S. Dist. LEXIS 23018 (S.D. Tex. June 25, 2004), respondent claims (at 26) the court was "vague" and stated only in "*dicta*" that the evidence presented did not support summary judgment on the issue of preemption. But respondent ignores the court's specific conclusion, as a matter of law, that retroreflective tape, "in and of itself, is not a 'warning device' as defined by" the *Manual on Uniform Traffic Control Devices for Streets and Highways* ("Manual"). 2004 U.S. Dist. LEXIS 23018, at *12. Further, the

Lesly court did not, as respondent suggests, reserve the preemption issue for consideration at trial. Instead, it ruled that "Union Pacific cannot rely on the doctrine of preemption in this action." *Id.* As respondent notes, the *Lesly* court also indicated that it was "unclear" whether federal funds had been used to apply retroreflective tape to the crossing in question. *Id.* But that identification of uncertainty in the record would not have justified barring the preemption defense. The only sufficient basis for that outcome was the court's unequivocal conclusion that retroreflective tape, "in and of itself, is not a 'warning device' as defined by" the Manual. *Id.*

Respondent seeks (at 26) to dismiss *Enriquez v. Union Pacific Railroad Co.*, No. 5:03-CV-174, 2004 U.S. Dist. LEXIS 28989 (E.D. Tex. Dec. 30, 2004), as "contain[ing] little independent analysis" and blindly following *Lesly*. That mischaracterizes the decision. The *Enriquez* court not only considered *Lesly* to be persuasive authority but also independently articulated its reasoning in concluding that retroreflective tape is not a warning device: "In the same sense that the pole of a crossbuck sign is not a passive warning device, the tape, without more, is not a passive warning device." *Id.* at *45.

Respondent notes that *McDaniel v. Southern Pacific Transportation*, 932 F. Supp. 163 (N.D. Tex. 1995), reached a contrary result. Respondent's suggestion (at 27) that federal district courts in Texas likely will follow the "published" opinion in *McDaniel* ignores that no court has done so since 1995 and that two courts (*Lesly* and *Enriquez*) in fact have reached the opposite conclusion. In any event, *McDaniel* further demonstrates the confusion in the lower courts on the appropriate standard for determining preemption

under *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000).

II. THIS CASE IS IMPORTANT

Respondent attempts (at 27-28) to show briefly at the very end of its brief that the decision below resolved only a "narrow, fact-bound question of whether retroreflective tape added to crossbucks pursuant to the 1989 Program triggers preemption" under *Easterwood* and *Shanklin*. But respondent's effort lacks credibility. Throughout its brief in opposition, respondent trumpets the breadth of the decision below. In re-stating the question presented, respondent proclaims that the Texas Supreme Court "h[e]ld that *federally-funded improvements at a railroad crossing*" suffice to establish preemption. Opp. i. The next 26-and-a-half pages of the brief in opposition further reinforce respondent's embrace of the sweeping nature of the Texas Supreme Court's holding – a holding that respondent undoubtedly hopes to use to its advantage in future litigation arising in a variety of factual circumstances.[1]

Respondent's suggestion that the question presented does not warrant certiorari because this Court already has considered the preemptive effect of the regulatory scheme at issue in *Easterwood* and *Shank-*

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[1] *See, e.g.*, Opp. 1 ("[T]he application of the tape to a sign effectively 'installs' a new and upgraded sign."), 11 (stating that the court below held "that the 'enhancement or maintenance of an existing sign to meet FHWA requirements' using federal funds constitutes federal 'approval of "the type of warning device to be installed" within the meaning of subsection (b) of the Grade Crossing Design regulations,' and therefore pre-empts any state law theory that would require additional or inconsistent warning devices") (quoting Pet. App. 19a-20a).

lin also lacks merit. Those cases addressed whether preemption follows when § 646.214(b) applies. But the issue here is *whether* § 646.214(b) even applies. The proper scope of that regulation – a question on which *Easterwood* and *Shanklin* provided little guidance – has divided the lower courts. This Court regularly grants review to clarify confusion in the interpretation of broad principles set forth in its prior decisions.[2] Moreover, notwithstanding *Easterwood* and *Shanklin*, the preemptive effect of § 646.214(b) in suits arising from accidents at railway crossings continues to be a frequently recurring issue warranting this Court's intervention.

Respondent also argues that the question presented is of diminishing importance in light of a 2004 Texas program to upgrade crossbucks at passive crossings with new crossbucks. But, even assuming that respondent's extra-record information about the 2004 Texas program is accurate, this case is about much more than the preemptive effect of the application of retroreflective tape on crossbucks in Texas. Under the decision below, as respondent reads it, essentially any improvement at a railway crossing constitutes the installation of a warning device that triggers preemption. *Malone*, *Boomsma*, and *Duncan*

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[2] *See* Eugene Gressman et al., *Supreme Court Practice* 253 (9th ed. 2007) (collecting cases granting certiorari "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification"); *see also id.* at 297 (citing cases granting certiorari "to determine whether the state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation").

undoubtedly would have come out differently under that standard.[3]

Not only does respondent's own position demonstrate the broad significance of the question presented in this case, but that position is confirmed by respondent's own *amici* in the court below. The Association of American Railroads ("AAR") asserted below that "the issues raised in this case will likely recur with great frequency." AAR *Amicus* Br. at 4, 12 (Tex. filed May 3, 2006). Similarly, *amicus* BNSF Railway Company contended that "[f]ederal preemption is the critical threshold issue for grade crossing suits in courts *throughout the United States*." BNSF *Amicus* Br. at 3 (Tex. filed Apr. 25, 2006) (emphasis added).[4] Notably, neither respondent nor its *amici* said anything about the 2004 Texas program when they sought to persuade the Texas Supreme Court to grant discretionary review of this case in 2006. Respondent's *amici* were correct then – this case is important.

---

[3] Respondent asserts (at 28) that "most" existing crossbucks were replaced under this program, without providing additional detail. The materials on which respondent relies do not make clear, however, whether warning devices in fact were installed or existing devices were merely upgraded. In any event, the 2004 program does not diminish the significance of the question presented because, as is reflected in the cases from other courts on which petitioners rely, the proper scope of § 646.214(b) is an issue that arises in a variety of factual circumstances.

[4] Respondent attempts to explain away the statements of its *amici* by claiming (at 28) that this case was only important when respondent lost. But the representations of respondent's *amici* – which emphasized that the preemptive effect of improvements to railway crossings is a recurring issue – do not admit to such an outcome-determinative reading.

III. THE DECISION BELOW IS INCORRECT

Under *Easterwood* and *Shanklin*, state law is preempted only when "federal funds participate in the installation of warning devices," *Easterwood*, 507 U.S. at 671, because it is only then that the grade-crossing regulation, which refers to the "install[ation]" of a "warning device" at a crossing, 23 C.F.R. § 646.214(b)(4), "cover[s] the subject matter of" state law within the meaning of the Federal Railroad Safety Act's express preemption provision, 49 U.S.C. § 20106(a)(2). Under the regulation's plain language, no "warning device" was "installed" when retroreflective tape was applied to the existing crossbucks at the Front Street crossing because retroreflective tape is not a "warning device," 23 C.F.R. § 646.214(b)(4), and because the application of tape is not "installation," *Easterwood*, 507 U.S. at 671. *See* Pet. 21-26. The correctness of that analysis has been confirmed by the responsible federal agency's official interpretation of the relevant regulations. *See* Pet. 26-29; Pet. App. 116a.

The bulk of the brief in opposition (at 14-22) addresses the merits of the decision below. Those arguments ignore the worthiness of this case for review and can be addressed by this Court after certiorari is granted. In any event, respondent's contentions have no merit.

A. Respondent endorses (at 15-18) the Texas Supreme Court's conclusion that the federally funded "'enhancement . . . of an existing sign to meet FHWA requirements'" preempts state law. Opp. 15 (quoting Pet. App. 19a) (alteration in original). But this Court has made clear that, for state law to be preempted, the railroad must "establish that federal funds 'participate[d] in the *installation* of the [warning]

devices'" at the crossing where the accident occurred. *Easterwood*, 507 U.S. at 672 (alterations in original, emphasis added). Respondent's core theory appears to depend on the unsupported notion that "the application of the tape to a sign *effectively* 'installs' a new and upgraded sign" that therefore triggers preemption. Opp. 1; *see also* Opp. 16 (an upgrade "is effectively the 'installation' of a new warning device"). But, under the plain text, preemption exists only where there is a federally funded "install[ation]" of a warning device, 23 C.F.R. § 646.214(b)(4) – not the "effective[]" installation of one, whatever that would mean.[5]

B. Respondent spends only one page (at 18-19) defending the main merits holding of the decision below – that the application of the retroreflective tape was itself the installation of a warning device. *See* Pet. App. 16a. Respondent states baldly (at 18), as the court below did, that the tape is "clearly" a marking as that term is used in 23 C.F.R. § 646.204. As petitioners explained, however, that interpretation contradicts the regulations' text, as further interpreted by the Manual. *See* Pet. 23-26.[6]

[5] Realizing that its position lacks textual support, respondent resorts to absurd examples and mischaracterizations of petitioners' position. Respondent's claim (at 16) that, under petitioners' position, simply removing the crossbucks from the ground, sticking tape on them, and planting them back in the ground would support preemption is erroneous; petitioners take no such position.

[6] Respondent asserts (at 19) that the tape provides a different kind of warning than the crossbuck sign. But that does not make the tape a "marking" designed to warn motorists of the presence of a crossing as that term is used in the regulations or Manual. The Manual makes clear that, by "marking," the regu-

C. Respondent also argues that the Texas Supreme Court correctly disregarded the FHWA's official interpretation. Like the court below, respondent criticizes (at 19) the form of the official interpretation, in an effort to minimize its significance. But the FHWA's interpretation was not some off-the-cuff answer, as respondent attempts to portray it, but was rather an official interpretation promulgated under the agency's rules for requesting and issuing such interpretations. *See* Pet. 26-29. The decision below gave no recognition of that significance and failed to accord the agency charged with interpreting the regulations the deference it deserved.[7]

Respondent also relies (at 16-18) on an FHWA memorandum's statements that changes in the Manual may lead to changes in previously erected devices and that "then the crossing device will be the device that is treated as being in compliance with Part 646." Opp. App. 2a. But that memorandum does not purport to define "warning device" or to explain what is an "installation." And respondent's claim (at 17) that "[o]f course FHWA's approval authority is coextensive with pre-emption" is a circular misreading of *Easterwood* and *Shanklin*. Those cases establish that, "for projects in which federal

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lations contemplate items such as pavement markings on the road, not retroreflective tape. *See* Pet. 25.

[7] Contrary to respondent's claim (at 20), petitioners preserved their claim for deference in the court below. In fact, one of the *questions presented* by petitioners was framed in terms of whether the agency permissibly interpreted its own regulation. *See* Brief on the Merits of the Limmer Parties as Respondents at x (Tex. filed Jan. 31, 2007). Petitioners also argued for deference specifically throughout their papers below. *See id.* at 22; *see also* Response by the Limmer Parties to Petition for Review at iv, 7 (Tex. filed May 2, 2006).

funds participate in the *installation of warning devices*," federal approval of the devices is implied and preemption is warranted. *Easterwood*, 507 U.S. at 671. Nothing in *Easterwood* or *Shanklin* suggests that federal approval of some other activity that is not the installation of a warning device justifies preemption.

In any event, the FHWA memorandum that respondent cites provides no reason to deny review. If respondent were correct about the memorandum's meaning, the memorandum would conflict directly with the FHWA's official interpretation. Confusion regarding the agency's position will only foster increased inconsistency in judicial decision-making. Accordingly, the Court should consider calling for the views of the Solicitor General if it needs clarification on the agency's position before granting certiorari.

D. Finally, respondent erroneously argues (at 21-22) that the presumption against preemption is irrelevant to the interpretation of the grade-crossing regulations. The court below was charged with interpreting the scope of preemptive federal regulations, a classic case for application of the presumption against preemption. *See, e.g., Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715-16 (1985); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (presumption applies not only to the question whether Congress intended any preemption at all, but also to "questions concerning the *scope* of its intended invalidation of state law"); Constitutional and Administrative Law Scholars *Amicus* Br. 2-13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

PATRICIA LIMMER, BILLYE JOYCE SMITH, AND BOBBY JEAN NOTHNAGEL,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF OF CONSTITUTIONAL AND ADMINISTRATIVE LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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May 17, 2010

QUESTION PRESENTED

Whether the federally funded addition of a component of a warning device (retroreflective tape) to an existing warning device (a crossbuck warning sign) at a railroad crossing is the installation of a "warning device" under 23 C.F.R. § 646.214(b)(3) and (4) so as to preempt state-law claims of negligence under this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), where federal regulations define "[p]assive warning devices" as "traffic control devices," 23 C.F.R. § 646.204, and the responsible federal agency has ruled that retroreflective tape is not a "traffic control device."

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INTEREST OF *AMICI CURIAE*[*]

Amici are law professors who teach and write in the areas of constitutional and administrative law.[1] *Amici* wish to promote coherence both in judicial interpretation of preemptive federal statutes and regulations governing grade-crossing safety and in the judicial approach to regulatory preemption issues generally. The decision in this case will have wide-ranging consequences not only for victims of rail accidents, but also for the scope of permissible regulatory preemption and the balance of federal and state regulatory authority in general.

STATEMENT

This petition presents this Court with the opportunity to clarify two important issues in preemption law. First, the Texas Supreme Court failed to apply the presumption against preemption, *see Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), in interpreting preemptive federal railroad regulations, despite this Court's recent emphasis on the applicability of that presumption in *all* preemption cases. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). The *Rice* presumption is an important canon governing judicial interpretation of the preemptive scope of federal law that maintains

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties were provided notice of *amici*'s intention to file this brief on May 7, 2010, as required by Rule 37.2(a), and that all parties have consented to the filing of this brief.

[1] A full list of *amici* is set forth in the Appendix to this brief.

the constitutional balance of federal and state authority. The presumption unquestionably applies here and requires the conclusion that petitioners' claims are not preempted.

Second, the Texas Supreme Court adopted the wrong approach for resolving ambiguities in the preemptive scope of the federal regulatory regime governing rail safety. This Court's administrative law and federalism decisions suggest that, where Congress has both expressly stated its preemptive intent in a statute and delegated preemptive rulemaking authority to an agency, the scope of preemptive federal regulations should be constrained by Congress's preemptive intent. The Texas Supreme Court's holding that essentially any federally funded alteration of grade-crossing safety equipment preempts stricter state-law requirements should be rejected because it is inconsistent with congressional intent.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD MAKE CLEAR THAT THE PRESUMPTION AGAINST PREEMPTION APPLIES TO *EVERY* PREEMPTION QUESTION

This Court first articulated a "presumption against preemption" in *Mintz v. Baldwin*, 289 U.S. 346, 350–52 (1933), and the canonical formulation is found in *Rice*: courts in preemption cases must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 331 U.S. at 230. The presumption applies equally to questions of statutory and regulatory preemption. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715–16

(1985). The Texas Supreme Court reached the wrong result by failing to apply the presumption here.

A. The Presumption Against Preemption Is An Essential Component Of Federalism Doctrine

The evolution of Commerce Clause jurisprudence has created a world in which nearly everything is subject to concurrent state and federal regulatory authority. As a result, the most important federalism questions concern not what Congress *can do* as a matter of constitutional power, but rather what Congress *has done* and how much room it has left for state regulation. *Compare, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005) (construing Congress's Commerce Clause power broadly to allow regulation of homegrown medical marijuana), *with Gonzales v. Oregon*, 546 U.S. 243 (2006) (construing the Controlled Substances Act *not* to authorize the Attorney General to preempt Oregon's Death with Dignity Act).

The pre-*Rice* approach was that any federal regulation in a field broadly preempted state law. *See, e.g., Chicago, R.I. & Pac. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U.S. 426, 435 (1913). That worked only as long as federal regulatory authority was narrowly confined. The *Rice* presumption was developed alongside the New Deal's expansive judicial interpretations of congressional power, *see, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942), and is complementary. As federal power expanded, continued application of the pre-*Rice* presumptive-field-preemption rule would have quickly eradicated state regulatory authority. The *Rice* presumption provided a way to maintain a viable role for state governments even as federal

authority was extended to nearly every subject. *See generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 806 (1994).

The *Rice* presumption embodies the understanding that structural and political safeguards are the primary mechanisms for protecting states against federal encroachment and that the main task of judicial federalism doctrine is to reinforce those safeguards. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–54 (1985); *see generally* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130–34 (2004). As the Supreme Court explained in *Gregory v. Ashcroft*:

> [I]nasmuch as this court in *Garcia* has left primarily to the political process the protection of states against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

501 U.S. 452, 464 (1992) (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d ed. 1988)). Two essential federalism safeguards are: (1) the political representation of the states in Congress, which provides opportunities for states to oppose federal encroachment on their regulatory authority, *see* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); and (2) the difficulty of navigating the Article I legislative process, which keeps the overall volume of

preemptive federal legislation down, *see* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1330 (2001).

The presumption against preemption is the most important judicial tool for reinforcing these structural protections for federalism. This Court's application of the *Rice* presumption in two recent preemption decisions—both involving expansive federal regulatory schemes alleged to preempt traditional state remedies for torts or deceptive trade practices—reemphasizes the presumption's status as a centerpiece of judicial federalism doctrine. *See Wyeth*, 129 S. Ct. at 1194–95 (applying the presumption and holding state tort claims not preempted by the Federal Food, Drug, and Cosmetics Act's drug labeling provisions or regulations); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543–44 (2008) (applying the presumption and holding state deceptive trade practice laws not preempted by the Federal Cigarette Labeling and Advertising Act).

The rationale for the presumption against preemption applies equally, if not with more force, where the allegedly preemptive federal law is an administrative regulation. The national legislative process's "built in" federalism safeguards support the presumption that ambiguity regarding preemption in a federal statute reflects the absence of congressional intent to preempt state law. While state interests may be represented adequately in federal administrative processes, agencies nevertheless lack the constitutionally mandated features of Congress that comprise durable federalism protections.[2] If

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[2] As Justice Stevens noted, "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate

agencies *do* adequately represent state interests, narrow construction of preemptive regulations under the *Rice* presumption is justified for the same reason it is justified in statutory interpretation: narrow interpretations will best approximate the preemptive scope intended by a federalism-conscious agency.[3] And if agencies are *less* responsive to federalism concerns than Congress, narrow judicial interpretations according to the *Rice* presumption will protect the federalism values that administrative processes under-protect.[4] Accordingly, this Court has held that the presumption against preemption applies equally where state law is purportedly preempted "by an agency, acting pursuant to congressional delegation." *Hillsborough County*, 471 U.S. at 715–16.

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comprehensive and detailed regulations that have broad preemption ramifications for state law." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting). *See generally* Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111 (2008).

[3] As the Court explained in *Hillsborough County*, Congress might delegate authority to an agency to preempt state law by regulation because "the agency can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements." 471 U.S. at 721. The reality of this perceived agency advantage is a subject of intense debate. *See generally* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1971–74 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755–56 (2008) [hereinafter Merrill, *Preemption*]; Nina A. Mendelson, *The California Greenhouse Gas Waiver Decision and Agency Interpretation: A Response to Professors Galle and Seidenfeld*, 57 DUKE L.J. 2157, 2158 (2008); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 774–77 (2004).

[4] *See* Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 876–81 (2008).

Recent cases demonstrate that preemption typically involves central state regulatory concerns—including regulation of local telephone markets, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), protection of state waterways from oil spills, *United States v. Locke*, 529 U.S. 89 (2000), state healthcare policy, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), medical ethics, *Gonzales*, 546 U.S. 243, and state tort remedies, *Wyeth*, 129 S. Ct. 1187; *Altria*, 129 S. Ct. 538; *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005). Because of their subject matter and the frequency with which they arise, the stakes for federalism in preemption cases are particularly high. As Justice Breyer observed:

> [I]n today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional effort to trim Congress' commerce power at its edges, . . . or to protect a State's treasury from a private damages action, . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.

Egelhoff v. Egelhoff, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting). For this reason, it is essential to view preemption cases as not just about the technical details of the federal statute at issue, but also about the broader *constitutional* concern of maintaining balance in our federal system. The presumption against preemption is the primary judicial tool for maintaining that balance.

B. The Presumption Applies With Particular Force Where, As Here, Federal Law May Displace Exercises Of Traditional State Police Powers

This Court has in the past suggested that the presumption against preemption may apply, not in every preemption case, but rather only in cases involving federal encroachment on areas of "traditional" state authority.[5] But *Wyeth* makes clear that the presumption applies "in *all* preemption cases, and *particularly* in those in which Congress has legislated in a field which the States have traditionally occupied." 129 S. Ct. at 1194 (internal quotation marks and brackets omitted, emphasis added); *see also Altria*, 129 S. Ct. at 543 (quoting *Lohr*, 518 U.S. at 485) (holding that the presumption against preemption "'applies with particular force when Congress has legislated in a field traditionally occupied by the States'").

Applying the presumption in all cases is the better approach. If a significant federal regulatory presence were sufficient to render the *Rice* presumption inapplicable, then there would be virtually no cases in which to apply it. Today there is significant—though not exclusive—federal regulation in nearly every field. Thus lawyers can characterize almost every case as falling within a traditionally federal *or* state regulatory field, depending on their purposes. This case provides an exceptionally vivid example: If mere federal funding for some reflective tape on

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[5] *Compare, e.g.*, *Locke*, 529 U.S. at 108 ("[A]n assumption of non pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence."), *with Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (stating that the presumption against preemption applies in "all pre-emption cases").

a crossing sign is sufficient to displace the *Rice* presumption, then the concept of a significant federal presence has been extended to its logical—but absurd—conclusion.

It was this very difficulty in drawing sharp distinctions between areas of state and national authority that prompted the Court to abandon its restrictive reading of the Commerce Clause after 1937. In rail safety, as in most other areas, there in fact has been significant federal *and* state regulation for some time.

The presumption unquestionably applies here, where the target of the preemption claim is state tort law prescribing duties of care for railroads and providing remedies for victims of rail accidents. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664–65 (1993). The Court has repeatedly emphasized the *Rice* presumption where state attempts to protect health and safety are at issue, *see Hillsborough County*, 471 U.S. at 719; *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981), and has noted that tort law is an essential tool for states in exercising this historic police power, *see Lohr*, 518 U.S. at 475, 484–85.

Moreover, the presumption against preemption should have particular force here because state law has played an important role in governing railroads since the earliest days of the industry. Before federal entry into the regulatory field, states were the acknowledged primary regulators of railroads. The nature of federal railroad regulation from its inception has been to carve out niches of federal

exclusivity from a backdrop of general state regulatory power.[6]

Thus, even under the now abandoned pre-*Rice* automatic field preemption rule, this Court recognized that, until Congress displaced it by statute, states had authority to regulate rail safety. *See Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U.S. 96, 99–100 (1888) ("Until [federal] legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits."). Indeed, the Court recognized the traditional application of state common law to rail crossings more than a century ago, holding that tort duties may legitimately require a railroad to take additional precautions "even though it may have complied literally with the terms of a statute prescribing certain signals to be given, and other precautions to be taken by it, for the safety of the traveling public at crossings." *Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 420–21 (1892); *see Continental Improvement Co. v. Stead*, 95 U.S. 161, 164 (1877) (explaining that trains approaching crossings must give "reasonable and timely warning").

In *Easterwood*, the Court reaffirmed that the default regulatory regime for railroad crossings includes peacefully coexisting state tort law and federal safety regulations. *See* 507 U.S. at 667–68. Indeed, the Court suggested that negligence liability may *complement* other state and federal efforts to increase crossing safety by "encouraging railroads —the entities arguably most familiar with crossing

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[6] *See* Gardbaum, *supra*, at 803–05; THOMAS O. MCGARITY, THE PREEMPTION WAR 67 (2008) ("Throughout most of the nation's history, conduct at grade crossings was governed by a combination of state laws, local ordinances, and common law duties. . . .").

conditions—to provide current and complete information to [a] state agency responsible for determining priorities for improvement projects in accordance with" federal regulations requiring states to establish a "highway safety and improvement program" and "a program for the elimination of [rail-crossing] hazards" in exchange for federal funds. *Id.* at 665-66 & n.6, 668; *see* 23 C.F.R. pt. 924; 23 C.F.R. § 1204.4.[7] The Court rejected the argument that the provision of federal crossing safety guidance, alone, was intended to unsettle this long-standing, multi-layered regime. *See* 507 U.S. at 665-66 & n.6, 668.

In a report on crossing safety that Congress requested in the Federal Railroad Safety Act of 1970 ("FRSA"), the Secretary of Transportation emphasized the value of state tort liability in ensuring "continuing interest on the part of the railroads in bringing about a reduction in grade crossing accidents." U.S. Dep't of Transp., Federal Railroad Admin. & Federal Highway Admin., *Report to Congress, Railroad-Highway Safety – Part II: Recommendations for Resolving the Problem* 103 (1972) [hereinafter *Crossing Safety Report II*]. Where federal and state regulation overlap and complement each other in this way, a claim of regulatory preemption must be supported by

[7] The symbiotic relationship between prospective regulation and retrospective liability is recognized in a variety of contexts. *See, e.g.*, William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1574, 1585 (2007) ("[T]he different actors and modalities of state common law litigation make it a critical, although only partial, antidote to predictable sorts of government failures."); Aaron S. Kesselheim & Jerry Avorn, *The Role of Litigation in Defining Drug Risks*, 297 J. AM. MED. ASS'N 308, 308-09 (2007) (giving examples); *Bates*, 544 U.S. at 451 (noting a similar role for tort law in pesticide regulation).

evidence "that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County*, 471 U.S. at 716.

Congress, too, has consistently recognized and preserved the important, complementary role of state law, and particularly state tort remedies, in legislating to improve the safety of railroad crossings. Despite numerous federal rail-safety improvement appropriations in the first half of the twentieth century, states retained primary regulatory jurisdiction over railroad crossings. *See Nashville, C. & St. L. Ry. Co. v. Walters*, 294 U.S. 405, 413–414 & n.3 (1935) (collecting cases). The FRSA expressly reaffirmed the states' role in monitoring dangerous crossing conditions, *see* 49 U.S.C. § 20105, regulating crossing safety generally, through tort law or otherwise, until the issuance of specific federal regulations "covering the subject matter" of state measures, *id.* § 20106(b), and regulating crossing safety with respect to "essentially local hazard[s]" so long as state regulations do not conflict with federal requirements or burden interstate commerce, *id.* § 20106(c).[8]

The Texas Supreme Court ignored the *Rice* presumption and selected an interpretation of the Federal Highway Administration's ("FHWA") regulations that contravenes Congress's regulatory goals and the scope of preemption Congress

[8] Federal regulations also expressly contemplate the application of state safety standards to grade crossings. *See* 23 C.F.R. § 646.214(b)(1) ("All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways *supplemented to the extent applicable by State standards*") (emphasis added).

contemplated. Settled doctrine requires a different result.

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO CLARIFY THE RULES FOR RESOLVING AN IMPORTANT CATEGORY OF ADMINISTRATIVE PREEMPTION ISSUES

This Court has held that "[f]ederal regulations have no less pre-emptive effect than federal statutes," *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), and that the presumption against preemption applies in determining preemptive effect of federal regulations as well as statutes, *Hillsborough County*, 471 U.S. at 716. Yet substantial uncertainty still surrounds regulatory preemption issues. *See generally* Young, *Executive Preemption*, *supra*. This case is an opportunity to clarify the approach to an important category of cases in this area: those involving a federal statute that contains express preemption language and a delegation of preemptive rulemaking authority to an agency.

Clarifying the doctrine and providing guidance to lower courts on administrative preemption issues is critical, first, because administrative agencies far outpace Congress in the production of substantive federal law. *See INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting). Thus, agency actions are likely to arise in many preemption cases. Second, because preemption directly impacts the allocation of regulatory authority between the federal and state governments, it is especially important for this Court to establish stable rules that give fair notice to state and federal regulators of how the scope and effect of regulatory preemption should be determined. *Cf. United States v. Lopez*, 514

U.S. 549, 630–31 (1995) (Breyer, J., dissenting) (emphasizing the importance of certainty in defining the relative scope of state and federal power).

Here, Congress's delegation of preemptive rulemaking authority to the FHWA means that federal regulations will ultimately establish the specific federal safety standards that preempt state law "covering the same subject matter." In these circumstances, the approach most consistent with this Court's decisions is to construe the preemptive scope of such regulations with both Congress's intent and the presumption against preemption firmly in mind. Interpretations that stretch beyond Congress's preemptive intent should be rejected.

A. Congress's Preemptive Intent Should Guide Interpretation Of Federal Regulations Issued Under Delegations Of Preemptive Rulemaking Authority

The Constitution's Supremacy Clause identifies three categories of supreme federal law: "This Constitution," "the Laws of the United States which shall be made in Pursuance thereof," and treaties. U.S. CONST. art. VI, cl. 2. This Court's holding that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation," *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986), confirms what the Supremacy Clause would in any event require: an agency's authority to preempt state law is entirely derivative of Congress's authority. Thus, in cases involving agency actions, Congress's intent remains the "ultimate touchstone" of preemption analysis. *See, e.g.*, *Lohr*, 518 U.S. at 485–86.

This Court, following the presumption against preemption, construed the scope of the FRSA's express preemption provision narrowly in *Easterwood*. *See* 507 U.S at 663–64. That provision preserves state law "related to railroad safety" until a federal regulation "covering the subject matter of the State requirement" is issued. 49 U.S.C. § 20106. The Court explained that "'covering' is a more restrictive term" than, for example, "relating to," and thus "pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S at 663–64. Two FHWA regulatory provisions may "cover" the subject matter of state tort duties relating to the safety of rail crossings: 23 C.F.R. §§ 646.214(b)(3) and (b)(4). *See Easterwood*, 507 U.S. at 670; *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 354 (2000). These provisions "establish a standard of adequacy that 'determine[s] the devices to be installed' when federal funds participate in [a] crossing improvement project." *Shanklin*, 529 U.S. at 354 (quoting *Easterwood*, 507 U.S. at 671). Where applicable, these FHWA "standard[s] of adequacy" constitute specific federal requirements for crossing safety that "substantially subsume the subject matter of" state tort law that would otherwise determine railroads' legal duties regarding crossing safety. *Id.* In short, here preemption turns on whether or not § 646.214(b)(3) or (b)(4) applies to the Front Street crossing.

An important question in cases like this is how courts should construe agency regulations that have this preemptive effect. Alongside the presumption against preemption, the scope of *Congress's*

preemptive intent should constrain interpretation of preemptive federal regulations.[9]

There are two broad categories of preemptive actions by federal agencies. Congress's preemptive intent is the touchstone, but that intent may be ambiguously expressed in a given federal statute. An agency with delegated authority to implement such a statute might address that ambiguity by issuing a formal interpretation of the statute's preemptive scope. *See, e.g.*, *Wyeth*, 129 S. Ct. at 1200–01 (discussing such an interpretation issued in a regulatory preamble by the Food and Drug Administration). The degree of deference, if any, warranted for such agency interpretations of the preemptive effect of federal statutes is unsettled. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 20–21 (2007).[10]

The agency also might simply issue preemptive regulations, believing them to be within its delegated authority. Put differently, an agency may itself take action, pursuant to a delegation of authority from Congress, that preempts state law. This case falls into this second category of preemptive agency actions. This Court's *Chevron* jurisprudence may require deference to the agency's conclusion that the statutory delegation includes authority to preempt

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[9] *Cf. Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2719–20 (2009) (rejecting an interpretation of preemptive regulations issued under the National Bank Act based, in part, on inconsistency with statutory evidence of Congress's intent regarding the scope of preemption).

[10] *See also* Nina A. Mendelson, *A Presumption Against Agency Preemption: Federal Agency Authority to Preempt State Law*, 102 NW. U. L. REV. 695 (2008) [hereinafter Mendelson, *Presumption*]; Merrill, *Preemption*, *supra*; Garrick B. Pursley, *Avoiding Deference Questions*, 44 TULSA L. REV. 557 (2009).

by regulation. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).[11] And, here, a seeming paradox may arise. Application of the *Chevron* doctrine in the preemption context is in tension with *Rice*, which cautions courts not to find state law preempted where Congress's preemptive intent is not "clear and manifest." 331 U.S. at 230. If the court defers to the agency, it risks allowing preemption beyond what was contemplated in the state-protective legislative process. *Cf. Garcia*, 469 U.S. at 550–54. That result means that Congress may, through delegation, remove preemption questions from the forum of federalism's process safeguards, or, perhaps, that the agency may take action that is beyond the authority Congress delegated.[12] Either way, deference produces tension with the process federalism rationale for the *Rice* presumption. Of course, agency actions, including preemptive regulations, are impermissible if they clearly exceed the agency's delegated authority. *See Louisiana Pub.*

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[11] The Court has applied *Chevron* deference to an agency's interpretation of the scope of its statutory jurisdiction. *See CFTC v. Schor*, 478 U.S. 833, 844–45 (1986); *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380–82 (1988) (Scalia J., concurring) (citing examples).

[12] Both possibilities are problematic in the light of this Court's canons for construing delegations of agency authority in a way that avoids constitutional doubts. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (declining to construe delegation of authority to an agency to allow actions that push the outer limit of the Commerce Clause power); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (stating the general rule that statutes should be construed in a manner that avoids raising doubts about their constitutionality). *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

Serv. Comm'n, 476 U.S. at 369–70. Where the substance of a preemptive regulation seems to fall within an agency's delegated authority but Congress's intent is unclear regarding the extent to which state law should be preempted by the federal regulatory regime established in a statute, the question of whether the agency's authority should be construed to include preemptive authority is very difficult. The proper scope of executive power to preempt state law without clear congressional authorization is a contested question.[13]

These concerns are less pointed here because Congress, in the FRSA, has clearly expressed its preemptive intent and the scope of the agency's delegated authority.[14] Under the circumstances, it is a relatively simple matter for the Court to avoid both the tension between its doctrines for construing Congress's delegatory and preemptive intent, on the one hand, and the specter of constitutional doubt raised by accepting agency conclusions about the preemptive scope of federal statutes in the absence of clear congressional intent, on the other. Deference to agency interpretations is justified in part by the belief that agencies often will be most familiar with, and thus best suited to interpret, the statutes they administer. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). Similar reasoning suggests that, where Congress's preemptive intent is clear, agencies will presumably tailor preemptive regulations closely to Congress's

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[13] *See* Young, *Executive Preemption*, *supra*, at 894–97; Mendelson, *Presumption*, *supra*, at 706–25.

[14] *Cf. Easterwood*, 507 U.S. at 664 (explaining that, for statutes with express preemption provisions, "the plain wording of" those provisions "necessarily contains the best evidence of Congress' pre-emptive intent").

intent. When choosing between competing interpretations of a preemptive federal regulation, the approach that best fits with existing doctrine is to select the interpretation most consistent with Congress's preemptive intent. *Cf. Wyeth*, 129 S. Ct. at 1216–17 (Thomas, J., concurring) ("[T]he Supremacy Clause . . . accords pre-emptive effect to only those policies that are actually authorized by and effectuated through the statutory text"). Non-preemptive interpretations of federal regulations create no tension with *Rice*; thus, not surprisingly, most of the cases in which this Court has followed agency views about preemption involved agency findings of *no* preemption. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 68 (2002); *Lohr*, 518 U.S. at 495; *Hillsborough County*, 471 U.S. at 716–18.

B. The Texas Supreme Court's Interpretation Of FHWA Regulations Contravenes Congressional Intent And Raises Constitutional Doubts

Congress's stated purpose in enacting the FRSA was "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. To that end, Congress concluded that "there can be, should be and must be a substantial upgrading of the level of railroad safety." H.R. Rep. No. 91-1194 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4104, 4105. Where "federal funds participate in the installation of warning devices," federal regulations become the preemptive "standard for the adequacy" of safety equipment at the crossing. *Easterwood*, 507 U.S. at 671; *Shanklin*, 529 U.S. at 357. The content of this federal "standard of adequacy," and thus the scope of

preemption, turns on what constitutes a "warning device" under the regulations. The regulations must be interpreted, however, in the light of Congress's broad goal of improving safety above the baseline that the federal regime was designed to augment.

Congress and the agency have long considered crossbuck signs to be the minimum safety precaution required at a railroad crossing. The Secretary of Transportation's report to Congress emphasized that thousands of grade crossings lacked even this minimum warning device. *See* U.S. Dep't of Transp., Federal Railroad Admin. & Federal Highway Admin., *Report to Congress, Railroad-Highway Safety – Part I: A Comprehensive Statement of the Problem* 67 (1971). The Secretary stressed that "[i]nstallation of these [crossbuck] signs would be made without any prior benefit-cost analysis, on the basis that *this is a mandatory minimum requirement for safety*." *Id.* (emphasis added). One of the Secretary's primary recommendations was to provide federal funding for crossbuck signs at all crossings as quickly as possible. *See Crossing Safety Report II*, at 90. In response, Congress enacted the 1973 Federal Railway-Highway Crossings Program, under which the FHWA regulations at issue here were promulgated. The statute provided federal funds to ensure that states would "[a]t a minimum . . . provide signs for all railway-highway crossings." 23 U.S.C. § 130(d); *see Shanklin*, 529 U.S. at 360 (Ginsburg, J., dissenting).

To be sure, Congress delegated authority to the agency to establish specific federal standards for railroad crossing safety equipment. But all delegations must contain an intelligible principle to guide agency discretion. *See Whitman v. American Trucking Co.*, 531 U.S. 457, 472 (2001); *J.W.*

Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). Congress's goal of improving crossing safety, viewed in the light of the consensus that crossbuck signs were (and are) the bare minimum of safety equipment needed at *every* crossing, suggests that Congress did not intend, nor could the agency reasonably understand Congress to have intended, to permit issuance of federal safety standards requiring anything less effective than crossbucks. It seems more likely that Congress viewed installation of crossbucks at all grade crossings as a necessary, but certainly not sufficient, initial step toward improving safety. Any preemptive federal standard for "adequate" crossing safety equipment laxer than the minimal requirement of crossbucks seems straightforwardly at odds with Congress's purpose.

But the Texas Supreme Court's interpretation of the regulations imputes to FHWA the promulgation of exactly such a standard. *See* Pet. App. 20a ("[W]e conclude as a matter of law that the application of retroreflective tape to the crossbucks at the Front Street crossing was an installation of a federally funded and approved warning device."). That interpretation has no limiting principle. It rests on reading "passive warning device" in the regulations to include any "marking." Under the court's interpretation, essentially anything could be a "marking." If applying retroreflective tape to some surface at a grade crossing constitutes "installation of a warning device" within the meaning of 23 C.F.R. § 646.214(b)(4), then, following *Easterwood* and *Shanklin*, federal funding for the application of retroreflective tape would constitute federal "approval" of the tape alone as "adequate" for safety at grade crossings where tape was deployed. Supplementary state regulations or tort law

requiring more than the application of the tape to, say, the trunk of a tree near an otherwise unmarked grade crossing would be preempted by this federal "standard of adequacy." Tape alone provides less warning than even the bare minimum crossbuck sign. Such a broad reading of the preemptive FHWA standard undermines Congress's safety-enhancement goal, the very reason for including preemptive language in the FRSA to begin with. Congress, having repeatedly recognized the value of overlapping state and federal regulatory authority for increasing crossing safety, simply cannot have intended that result.

If the Texas Supreme Court's interpretation of the substance of the preemptive federal standard had been advanced by the FHWA, there would be legitimate doubts about whether the agency had exceeded its delegated authority to preempt state law. That authority, again, must be defined by reference to Congress's intention to increase crossing safety above the status-quo level. A net-safety-reducing standard is inconsistent with that intention. That problem is easily avoided here, however, because the FHWA has taken the opposite view: that retroreflective tape is not a "traffic control device," Pet. App. 116a, meaning that it is not a "warning device" under 23 C.F.R. §§ 646.204 and 646.214(b)(4). An agency's interpretation of its own regulation ordinarily is entitled to substantial deference "unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).[15] In any event, the agency's view

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[15] The Texas Supreme Court's invocation of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), was inapt. *See* Pet. App. 18a. *Skidmore* is a standard of deference for agency interpretations

constitutes strong evidence that the agency did not intend its regulations to preempt state tort law under these circumstances. Evidence of agency intent *not* to preempt should be dispositive unless the text of the regulation *compels* the contrary conclusion. *See Hillsborough County*, 471 U.S. at 714–15. Here it does not.

The agency's construction is more consistent with Congress's purpose and the traditional overlap of federal and state authority on railroad safety matters. It is also consistent with the President's recent directive that agencies make decisions about preemption cautiously and only after considering the scope of their authority and state interests. *See Memorandum: Preemption*, 74 Fed. Reg. 24,693 (May 20, 2009). Even if the Court were to disregard all that and consider the agency's interpretation and that of the Texas Supreme Court to be equally plausible, the presumption against preemption requires breaking that tie in favor of the agency's interpretation, which preempts more narrowly.

CONCLUSION

The petition for a writ of certiorari should be granted.

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of federal *statutes* that do not satisfy *Chevron*'s requirements. *See Gonzales*, 546 U.S. at 255–56. Nor is either factor that motivated the *Shanklin* court to reject the agency's interpretation of its own regulations—a recent change in agency position seemingly related to litigation or inconsistency with the plain meaning of the regulations—present here. *Cf. Shanklin*, 529 U.S. at 354–56.

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APPENDIX

APPENDIX

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